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No. ____ Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DINA JAEGER,

Petitioner,

—v.—

CELLCO PARTNERSHIP, d/b/a VERIZON WIRELESS,
CONNECTICUT SITING COUNCIL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Background

Millions of migratory birds are killed each year from collisions with wireless cell phone communication towers. The U.S. Fish and Wildlife Service estimates the number of these annual bird deaths at 4 to 5 million.

Scientific studies show that cell tower radio frequency ("RF") emissions disorient navigation by migratory birds in flight, prevent mating, breeding and nest-building, and destroy bird embryos and habitat food sources needed to feed offspring.

Petitioner Dina Jaeger brought an injunction action under the Fourteenth Amendment as a U.S. citizen to enforce the Migratory Bird Treaty Act against Cellco and the Connecticut Siting Council by requiring them to relocate a proposed cellular tower in rural Connecticut away from a migratory bird flyway. The District Court dismissed the complaint for lack of standing and failure to state a claim, and the Court of Appeals affirmed by summary order.

The lower court decision conflicts directly and in principle with prior decisions of Circuit Courts of Appeals as well as the Supreme Court, and adds to the continuing confusion over these conflicting decisions. This is an important and recurring issue of federal law and one that should be decided and settled by the Supreme Court.

QUESTIONS

1. Should the Supreme Court resolve the conflict between the Second and D.C. Circuits over the Telecommunications Act's asserted preemption over the Migratory Bird Treaty Act and thereby help states apply and enforce U.S. migratory bird treaties?

2. Should the Supreme Court also resolve these additional Circuit Court conflicts raised by the decision below:

(a) Does the Migratory Bird Treaty Act ("MBTA") apply to all government agencies [Second, Eighth, Eleventh and D.C. Circuits]?

(b) Do private plaintiffs have standing to sue to enjoin agency violations of the MBTA [Second and D.C. Circuits]?

(c) Does the MBTA apply to state officers? [Second and D.C. Circuits, and United States Supreme Court]?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties are named in the caption. Corporate disclosure is not applicable to Petitioner who is a private citizen.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

The Summary Order of the U.S. Court of Appeals for the Second Circuit, affirming the District Court's dismissal of the complaint, filed on December 7, 2010, is reported unofficially at 2010 WL 4997606 (C.A.2 (Conn.)) A copy is reproduced in the Appendix at page 1a.

The Decision and Judgment of the District Court dismissing Petitioner's Complaint, filed on March 16, 2010, is reported unofficially at 2010 WL 65730 (D. Conn.); 49 Communications Reg. (P&F) 1109; and at 2010 U.S. Dist. LEXIS 24394. A copy is reproduced in the Appendix at page 4a.

The Circuit Court's order denying Jaeger's petition for rehearing, filed on February 1, 2011, is reported unofficially at 2011 U.S. Ann. LEXIS 2891 and is reproduced in the Appendix at page 36a.

BASIS FOR JURISDICTION IN THE SUPREME COURT

The order of the Court of Appeals sought to be reviewed was entered on December 7, 2010. A motion for rehearing was denied by the Circuit Court on February 1, 2011. This Petition for Certiorari is being filed within 90 days thereof.

The statutory provisions believed to confer on this Court jurisdiction to review the order in question on a writ of certiorari are 28 U.S.C. Sections 1254(1) and 2101.

If certiorari is granted, petitioner will request the Court to consider the constitutionality of Connecticut General Statutes §16-50v, which provides for funding of the Connecticut Siting Council by industry members appearing before the Council, creating a financial conflict of interest for Council members and staff and destroying the impartiality of the Siting Council. Since the state agency is already a party and is represented by an Assistant Attorney General of the state, no separate notice is required under Supreme Court Rule 29.4(c).

Certiorari is appropriate under Supreme Court Rules 10(a) and 10(c) because a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and in a way that conflicts directly and in principle with relevant decisions of this Court and other Circuit Courts.

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED IN THE CASE

Article I; Article III; Article VI; Amendment I; Amendment V; and Amendment XIV, Section 1 (all quoted in pertinent part *verbatim* in the Appendix at pp. 38a-40a).

Treaties involved in the case are The Convention for the Protection of Migratory Birds, Aug. 16, 1916 between the United States and Great Britain for Canada, 39 Stat. 1702, T.S. No. 628 (1916); Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. 912; Convention for the Protection of Migratory Birds and Birds in

Danger of Extinction, and their Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329; and The Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-U.S.S.R., 29 U.S.T. 4647, T.I.A.S. No. 9073.

Statutes involved in the case are the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, the Telecommunications Act of 1996, and Connecticut General Statutes §§16-50g and 16-50p, relevant portions of which are set forth *verbatim* in the Appendix at pp. 40a-50a.

STATEMENT OF THE CASE

This petition concerns a matter that affects the people of five nations—the United States, Canada, Mexico, Russia and Japan: protection of the flocks of songbirds and other bird species that winter in the tropics and then fly thousands of miles to summer in northern climates where they breed and raise their offspring, who will later fly south to repeat the same annual cycle.

Among the new technological hazards threatening the survival of these birds is the placement of wireless cell towers in migratory bird flyways as infrastructure for cell phones, blackberries, portable laptops, and an ever-growing number of electronic wireless devices. Requiring relocation of these towers would solve or reduce the problem.

The serious new threats to migratory birds that this case addresses include night-time collision with wireless cell towers and the destructive effects of cell tower RF radiation on bird nesting, propagation and habitat near tower sites.

In Connecticut, a state that is summer home to many of migratory bird species, decisions on the placement of cell towers are made by a specialized statewide agency—the Connecticut Siting Council (a party to this case). In order to reduce the nighttime collision deaths and other causes of bird mortality and harm from tower RF emissions, the Council has been advised by the U.S. Fish and Wildlife Service to choose tower locations away from bird flyways and concentrations. The Connecticut agency has refused to do so. In this case, the Second Circuit Court of Appeals has held that federal courts may not order states to do this, despite the applicability of the Migratory Bird Treaty Act to states recognized by the Supreme Court in 1920.

The Second Circuit's decision below also holds that the federal courts have no jurisdiction to hear citizen suits brought to compel state compliance with the MBTA. Both of these holdings conflict in principle and directly with decisions of this Court and decisions by other Circuit Courts of Appeal.

PROCEEDINGS BELOW

This is an injunction and declaratory judgment action against a state communications tower siting agency and a major wireless service provider (Verizon) to require selection of some alternative site for a proposed cell tower in rural Litchfield County, Connecticut, away from a migratory bird flyway. The District Court granted a motion to dismiss the action and the Court of Appeals affirmed by summary order.

The case began with an administrative proceeding before the Connecticut Siting Council considering the cell tower application of Cellco (Verizon) to construct a 157-foot cell tower in a migratory bird flyway in Falls Village (Town of Canaan), Connecticut. The Council refused to consider any steps to minimize the tower's harmful effects on birds. Dina Jaeger—an abutting property owner, dedicated bird watcher, and practitioner of traditional Native American religion—intervened in the proceeding to urge the Council to shift the tower site to avoid harm to the numerous migratory birds in the area. The Council rejected all of her arguments—including many scientific studies—on the ground that any agency action to move the tower site was barred by the Telecommunications Act of 1996. Ms. Jaeger sued for an injunction to halt tower construction in the U.S. District Court (51a), which denied all relief in a lengthy written opinion in March, 2010 (4a). The Second Circuit affirmed the District Court without opinion by summary order in December, 2010 (1a). A petition for rehearing was denied by the Court of Appeals in February, 2011 (36a).

STATEMENT OF FACTS

On March 12, 2009, the Connecticut Siting Council granted a Certificate of Environmental Compatibility and Public Need for the Construction, Maintenance and Operation of a personal wireless service telecommunications facility ("cell tower") at 188 Route 7 South, Falls Village (Canaan), Connecticut to Defendant Cellco Partnership d/b/a Verizon. On April 8, 2009, petitioner Dina Jaeger filed this action to void and enjoin the

CSC Certificate and for declaratory judgment and related relief. (Complaint, par. 1)

The case presents an important issue of federal law with significant international consequences on birds and wildlife. The Court's decision is important to protection of thousands upon thousands of migratory birds who must run the U.S. cell tower gauntlet every year during the annual migratory season.

Destructive Effects of RF Radiation on Migratory Birds

Petitioner Dina Jaeger presented scientific studies to the Connecticut Siting Council documenting the harm done to the navigation, reproduction and food sources of nesting birds in habitats close to cell towers. Scientific explanation supporting that evidence is stated in the record as follows:

> Animals are very sensitive electrochemical complexes that communicate with their environment through electrical impulses. Ionic currents and electric potential differences exist through the cellular membranes and corporal fluids. The intrinsic electromagnetic fields from the biological structures are characterized by certain specific frequencies that can be interfered with by the electromagnetic radiation, through induction and causing modification in their biological responses. . . . The low intensity pulsed microwave radiation from cellsites produces subtle athermal influences in the living organisms. . . Some effects are manifested exclusively with a certain power density, while others are manifested after a certain duration of the irradiation, which

> indicates long-term cumulative effects. . . . Research has shown such effects on the living organisms at molecular and cellular levels on immune processes, in DNA, on the nervous, cardiac, endocrine, immune and reproductive systems, modification of sleep and alteration of the cerebral electric response, increase of the arterial pressure and changes in the heart rhythm, and an increase in the permeability of the blood brain barrier.
>
> (Balmori, Alfonso, "Possible Effects of Electromagnetic Fields from Phone Masts on a Population of White Stork (Ciconia ciconia)," Electromagnetic Biology and Medicine, 24: 109-119, 2005 (Jaeger Exhibit IJ6) (Connecticut Siting Council Docket 360, http://www.ct.gov/csc/lib/csc/pendingproceeds/docket_360/360jaegerprefiled.pdf (last visited 2/2/11))

The scientific studies submitted to the Council by Jaeger show that the operation of cell transmission antennas is likely to:

> (a) interfere with migratory birds' natural navigation systems, causing tower strikes and fatalities after dark;
>
> (b) prevent migratory bird nesting and reproducing within 200 meters of cell towers; and
>
> (c) cause infertility and high mortality to insects, amphibians and field mice as food sources in migratory bird habitats.

The state agency refused to consider any of this evidence on the ground that the agency was

barred from doing so by the Telecommunications Act of 1996.

Historical Statutory Background and Framework

The earliest U.S. public recognition of threats to birds on a large scale resulted from wholesale killing of birds for their decorative feathers for ladies' hats. The market demand for feathers as commodities occurred at the same time that mass production of hunting weapons placed implements for mass destruction of birds into the hands of those motivated to kill them.

In quick succession the heath hen, golden plover, the passenger pigeon, and Eskimo curlew disappeared, and by the turn of the 20th century, hunting birds for feathers for ladies' hats and to decorate dinner plates of elegant restaurants had a devastating effect on the population of the snowy egret and other wading birds. This did not occur in any one location, but many places at once: the fashion centers of London, Paris, New York, Berlin and Vienna were major markets for the plume trade, affecting all continents and all types of birds. Due to the dramatic beauty of snowy egrets' nuptial feathers ("aigrettes") this species was particularly targeted as fashionably desirable and destined for destruction. It was reported that at a single London auction 50,000 ounces of feathers were offered. Based upon a formula of four birds per ounce of feathers, this single auction alone meant the destruction of 192,960 Great Egrets to supply a single fashion house.

At the urging of organized Audubon members and the increasing pressure of growing public outrage, Iowa Representative John F. Lacey sponsored The Lacey Act (16 U.S.C. § 3371-3378), America's first conservation law, which was signed by President McKinley in 1900, making it unlawful to transport illegally captured or prohibited animals across state lines. When individuals were subsequently sued by the government for violation of the Act, they asserted rights under the Tenth Amendment, and the law was struck down as unconstitutional. The act was subsequently amended in 1969, 1981 and 1989.

The Advent of International Protection for Migratory Birds

The Audubon societies became educational advocates for the protection of birds. The National Audubon Society was incorporated in 1905 and went to work on legislation and education to protect birds and wildlife at the national level.

In 1903, President Theodore Roosevelt established the first national bird reservation on Pelican Island, Florida, now Pelican Island National Wildlife Refuge.

The tension between commercial exploitation of birds and their preservation came to a head when the first Audubon ranger, Guy Bradley, was murdered by game poachers. This murder served to stir up citizen demand for statutory protections. In 1910, New York State's legislature passed the Audubon Plumage Law prohibiting the sale or possession of feathers from protected bird species, and in 1916 the first international treaty—"The Convention for the Protection of Migratory Birds,

Aug. 16, 1916" between the United States and Great Britain for Canada (39 Stat. 1702, T.S. No. 628), was ratified. In 1918, Congress enacted the law placing migratory birds under federal protection—The Migratory Bird Treaty Act ("MBTA"), implementing the treaty and giving force under U.S. law to its provisions, which is the subject of this case.

The Migratory Bird Treaties

The MBTA is one of the first federal wildlife management statutes and the first to give force to an international agreement. Before the advent of the Treaty Act, wildlife management was the purview of state governments.

In 1920, the Supreme Court upheld the MBTA as a valid exercise of Congress's treaty power. (*Missouri v. Holland*, 252 U.S. 416 (1920)). The MBTA has since been amended to implement treaties between the U.S. and Mexico (1936); Japan (1972); and the Soviet Union (1976).

The MBTA regulates "taking" of migratory birds. Originally, such taking was direct, in the form of hunting with intentional taking. In recent years, Courts have rendered broader interpretation of "taking" indirectly. See *United States v. FMC Corporation*, 572 F.2d 902, 905-906 (2d Cir. 1978)

In the case at bar, the state agency, respondent Connecticut Siting Council ("CSC"), ruled that the Migratory Bird Treaty was preempted by the Telecommunications Act of 1996 ("TCA"), rejected Jaeger's tower opposition, and granted the Cellco permit. The District Court and Court of Appeals

agreed—the former based on a dictionary definition of the word "environment," and the latter by summary order without giving any reason.

The basic issue raised by these rulings is squarely presented in this case:

Are state and local governments obligated to comply with the Migratory Bird Treaty Act (and related eagle protection federal statutes) and to reduce adverse environmental effects on migratory birds when making siting decisions for the placement of cell towers for carriers licensed under the TCA? If so, are the federal courts the proper forum for federal citizens to seek enforcement of the MBTA?

These are federal questions of nationwide application and international environmental impact that should be settled by this Court.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

This action arose under the Constitution, Laws and Treaties of the United States, including the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act, the Telecommunications Act, and under the Courts' general equitable jurisdiction. The District Court had jurisdiction over the federal question claims under 28 U.S.C. § 1331; over the declaratory judgment claims under 28 U.S.C. § 2201; and over claims for injunctive relief under the Fourteenth Amendment and the Court's general equitable jurisdiction.

On March 16, 2010, the District Court filed its Opinion and Order dismissing the Complaint in

its entirety. On December 7, 2010, the Court of Appeals affirmed the District Court's dismissal in a summary order. On February 1, 2011, the Court of Appeals denied Petitioner's motion for rehearing. All three orders are set forth in the Appendix. This Petition for Certiorari followed.

ARGUMENT

WHY CERTIORARI SHOULD BE ALLOWED

The Circuit Court's summary order adopted the full opinion of the District Court for the District of Connecticut. The lower court opinion contains significant rulings on the Migratory Bird Treaty Act. In particular, the following major rulings conflict directly and in principle with a long-standing decision of the U.S. Supreme Court and a recent decision of the Court of Appeals for the D.C. Circuit:

1. The Telecommunications Act of 1996 (TCA) preempts enforcement of the Migratory Bird Treaty Act.

2. Private plaintiffs do not have standing to enjoin state agencies from violating the Migratory Bird Treaty Act.

The Second Circuit's affirmance of the District Court rulings giving precedence to the TCA over the MBTA leaves federal law regarding state compliance with the migratory bird treaties in confusing disarray. It blocks state implementation of four United States treaties under which the United States undertook to protect one of the world's major natural resources—the great annual springtime flights of songbirds and other bird

species to the U.S. in order to breed and raise their offspring in a safe and hospitable environment.

It is undisputed that the MBTA applies to states. The issue here is whether the Telecommunications Act carves out an exception to the MBTA and prevents states from protecting migratory birds when deciding on the placement of cell towers.

Enforcement of the MBTA

The Migratory Bird Treaty Act does not contain an express provision for citizen injunction suits to enforce the Act against state officers or agencies. However, some federal courts have permitted citizen use of the federal Administrative Procedure Act to create civil jurisdiction against federal agencies to enforce the MBTA. The APA, however, does not apply to the states.

Citizen's rights under the treaties enforced by the MBTA are included among the privileges and immunities guarantees by the Fourteenth Amendment, which was the principal authority for Dina Jaeger's standing here, and necessarily includes the right to petition the courts for redress against threatened violation of her rights under the MBTA.

The MBTA is intended to preserve an international natural resource of major importance, and relies on inherent judicial powers for civil enforcement. Chief Justice John Marshall counseled that the Courts cannot stand idly by when there is a legal wrong that requires a remedy:

> The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.
>
> *Marbury v. Madison*, 5 U.S. 137, 163 (1803)

The two major federal issues that merit Supreme Court decision are part of a group of four conflicts of law generated by the Second Circuit decision below.

Summary of Circuit Court Conflicts

The lower court decision in this case creates conflicts of law between the Second Circuit and various other Circuit Courts of Appeals. Each of the following federal legal issues are involved in those conflicts either directly or in principle:

1. MBTA is preempted by the Telecommunications Act

PRO — **Second Circuit**

Jaeger v. Cellco (this case)

> The Council is preempted by the TCA from denying an application on the basis of the effects of RF emissions that fall within the permissible range set by the FCC." (Appendix p. 12a) * * * "[A] plain reading of the statute makes clear that the TCA preempts local and state authorities from regulating the placement of cellular towers on the basis of the environmental effects of RF emissions.
>
> (Appendix, p. 22a)

CON — D.C. Circuit

American Bird Conservancy v. FCC,
516 F.3d 1027, 1029 (D.C. Cir.2008):

> The American Bird Conservancy and Forest Conservation Council petition for review of an order by the Commission denying in part and dismissing in part their petition seeking protection of migratory birds from collisions with communications towers in the Gulf Coast region. ***
>
> While the Gulf Coast petition was pending, the Commission commenced a nationwide proceeding in a new docket. On August 20, 2003, it issued a Notice of Inquiry to gather evidence regarding communications towers' impact on migratory birds throughout the United States, and to determine whether to change its current rules and processes to better protect migratory birds. ***
>
> In April 2005, seeking to compel the Commission to act on the Gulf Coast petition, Petitioners filed a petition for a writ of mandamus in this court. Five days after oral argument, the Commission issued the Order denying in part, dismissing in part, and deferring in part the Gulf Coast petition. . . In dismissing the Gulf Coast petition, the Commission stated that it would address aspects of the migratory bird issue as part of a separate docket examining the issue on a nationwide basis. . . The court thereafter dismissed the mandamus action as moot.

[N.B. Note that neither the Court nor the FCC asserted that the protection of migratory birds is in any way preempted by the TCA.]

2. MBTA applies to federal and state government agencies:

PRO — **D.C. Circuit**

American Bird Conservancy v. FCC,
516 F.3d 1027, 1031 (D.C. Cir.2008):

> The court has held that the MBTA applies to federal agencies.

PRO — **D.C. Circuit**

Humane Society v. Glickman,
217 F.3d 882, 888 (D.C. Cir.2000):

> For many of the reasons we have mentioned, we disagree with the "tentative conclusion" in *Newton County Wildlife Ass'n v. United States Forest Service*, 113 F.3d 110, 115 (8th Cir.1997), and the holding in *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir.1997), that § 703 does not apply to federal agencies.

CON — **Second Circuit**

Jaeger v. Cellco (this case) (re state agencies):

> . . . Jaeger argues, in her first two claims for relief, that the construction of the cellular tower will result in impermissible harm to migratory birds and bald eagles in violation of the MBTA and BGEPA. The statutes that implement the MBTA and BGEPA are criminal statutes setting forth a scheme of strict liability for parties responsible for the death of protected birds. . . . Private plaintiffs may, via the Administrative Procedure Act ("APA"), pursue claims against federal agencies for failure to adhere to the MBTA and BGEPA.

> . . . A private plaintiff, however, may not sue state or municipal agencies under the APA.
>
> (Appendix, pp. 25a-26a)

CON — **Eighth Circuit**

Newton County Wildlife Ass'n v. U.S. Forest Service, 113 F.3d 110, 115 (8th Cir. 1997):

> In addition, we agree with the Forest Service that MBTA does not appear to apply to the actions of federal government agencies.

CON — **Eleventh Circuit**

Sierra Club v. Martin, 110 F.3d 1551, 1555 (11th Cir.1997) (Emphasis in original):

> The MBTA is a criminal statute making it unlawful *only* for persons, associations, partnerships, and corporations to "take" or "kill" migratory birds. Moreover, there is no expression of congressional intent which would warrant holding that "person" includes the federal government, thus enabling the United States to prosecute a federal agency, or a federal official acting in his official capacity, for taking or killing birds and destroying nests in violation of the MBTA. * * *
>
> The MBTA does not apply to the federal government. As no violation of the MBTA could occur by any formal action of the Forest Service, the Forest Service may not be enjoined under the APA.

3. Private plaintiffs have standing to bring suit to enjoin violations of the MBTA

PRO — **D.C. Circuit**

Humane Society v. Glickman, 217 F.3d 882, 886 (D.C. Cir. 2000) (Footnote omitted.):

> [T]he defendants reason that Congress could not have intended to have § 703 restrict federal agencies because there would have been no means to enforce the restrictions; at the time of its enactment, they tell us, there was no provision in the Migratory Bird Treaty Act for injunctive relief. [fn omitted.]
>
> The argument goes nowhere. Even without a specific review provision, there still could have been a suit against the appropriate federal officer for injunctive relief to enforce § 703. *Missouri v. Holland*, for instance, was a "bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act." 252 U.S. at 430, 40 S.Ct. 382. The Supreme Court had already recognized the "equity injunction as a method for review of administrative action" in *Noble v. Union River Logging R.R.*, 147 U.S. 165, 113 S.Ct. 271, 37 L..Ed. 123 (1893), affirming an injunction against the Secretary of the Interior although the underlying statute contained no provision for judicial review.

PRO — **D.C. Circuit**

Fund for Animals v. Kempthorne, 472 F.3d 872, 876 (D.C. Cir.2001):

> Judicial invalidation of the designation would restore protection to the mute swan and make Maryland's plan unlawful. The Maryland plaintiffs have standing.

CON — **Second Circuit**

Jaeger v. Cellco (this case)

> Because Jaeger lacks standing to enforce violations of the MBTA and BGEPA claims against a state agency and private company, her claims pursuant to those statutes must fail.
>
> (Appendix, p. 26a)

4. MBTA applies to state officers

PRO — **D.C. Circuit**

Humane Society v. Glickman, 217 F.3d 882, 885 (D.C. Cir. 2000)

> As § 703 is written, what matters is whether someone has killed or is attempting to kill or capture or take a protected bird, without a permit and outside of any designated hunting season. Nothing in § 703 turns on the identity of the perpetrator. There is no exemption in § 703 for farmers, or golf course superintendents, or ornithologists, or airport officials, *or state officers* or federal agencies.
>
> (Emphasis added.)

PRO — U.S. Supreme Court

See *Missouri v. Holland*, 252 U.S. 416 (1920).

CON — **Second Circuit**

Jaeger v. Cellco (this case):

> Private plaintiffs may, via the Administrative Procedure Act ("APA"), pursue claims against federal agencies for failure to adhere to the MBTA and BGEPA. . . . A private plaintiff, however, may not sue state or municipal agencies under the APA.
>
> (Appendix, pp. 25a-26a)

POINT I

THE SECOND CIRCUIT'S DECISION THAT THE TELECOMMUNICATIONS ACT OF 1996 PREEMPTS THE MIGRATORY BIRD TREATY ACT RAISES A FEDERAL QUESTION OF MAJOR IMPORTANCE AND CONFLICTS WITH DECISIONS OF THE SUPREME COURT, THE D.C. CIRCUIT, AND POLICY OF THE DEPARTMENT OF THE INTERIOR.

The District Court below concluded that FCC cell tower regulations under the Telecommunications Act of 1996 ("TCA") preempt consideration of any claim of environmental harm to birds and wildlife. The Court held that the Connecticut Siting Council is required to disregard harm to birds and wildlife in considering the placement of the Cellco cell transmission tower:

> Because Jaeger's first four claims challenge the Council's siting determination on the basis of the effects of RF emissions, they fail as a matter of law; *the Council is preempted by the TCA from denying an application on the basis of the effects of RF emissions that fall within the permissible range set by the FCC.*
>
> *Jaeger v. Cellco d/b/a Verizon Wireless and Connecticut Siting Council*, 2010 WL 65730 (D.Conn.) (Emphasis added.) (12a)

MBTA's Application to Cell Towers

Background

The MBTA regulates "taking" of migratory birds. Originally, such taking was direct, in the form of hunting and intentional capture. In recent years, Courts have adopted a broader interpretation to include taking indirectly:

> These cases involving hunters have consistently held that ". . . it is not necessary that the government prove that a defendant violated its [Migratory Bird Treaty Act] provisions with guilty knowledge or specific intent to commit the violation". *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966), *cert. denied*, 386 U.S. 943, 87 S.Ct. 976, 17 L.Ed.2d 874 (1967). *See, e. g., United States v. Ireland*, 493 F.2d 1208 (4th Cir. 1973); *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971); *United States v. Olson*, 41 F.Supp. 433 (W.D.Ky.1941); *United States v. Schultze*, 28 F.Supp. 234 (W.D.Ky. 1939). In *Shultze*, for example, defendants were convicted of vio-

> lating the MBTA and regulations by taking morning doves lured to a field by the use of wheat "bait". The court rejected defendants' contention that they had not baited the field and had no knowledge that the field was baited. The court found each defendant guilty "even though there was no evidence of any guilty knowledge or intent upon his part at the time of the commission of the offense". *Id.* at 236.
>
> *United States v. FMC Corporation*, 572 F.2d 902, 905-906 (2d Cir. 1978)

Birds play a major role in peoples' lives, and the MBTA protections have a significance and immediacy for Americans.

The United States Fish and Wildlife Service ("USFWS") of the Department of the Interior is tasked with regulation and enforcement of the MBTA (16 U.S.C. § 703 (2000)).

The USFWS has issued "Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers" to aid in implementation of the MBTA, referred to by the Siting Council in its Finding of Fact No. 65. One of the explicit USFWS guidelines states:

> Discourage the siting of towers near wetlands, other known bird concentration areas, in known migratory or daily movement flyways, or in habitat of threatened or endangered species.

All of these factors are present in this case, but were disregarded by the state agency in the granting of Cellco's permit, which was upheld by the District Court.

(A) Supremacy Clause

States are required to honor U.S. treaties. This has been Supreme Court doctrine since 1796, when the Court decided *Ware v. Hylton*, 3 U.S. 199 (1796). Justice Chase described the obligation of state and federal judges to comply with treaties as the supreme law of the land:

> It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by a repeal or nullification by a state legislature, this certain consequence follows—that the will of a small part of the United States may control or defeat the will of the whole. * * * [I]t is the declared duty of the state judges to determine any constitution or laws of any state contrary to that treaty (or any other) made under the authority of the United States null and void. National or federal judges are bound by duty and oath to the same conduct.
>
> *Ibid.* at 3 U.S. 237.

A state agency may not authorize telecom companies to violate these federal treaty commitments protecting migratory birds, or the law adopted for their enforcement.

(B) The TCA Savings Clause

The Telecommunications Act of 1996 explicitly provides that the Act "shall not be construed to

modify, impair or supersede existing Federal laws unless expressly so provided. . . ." (47 U.S.C. §414) See *Pinney v. Nokia*, 402 F.3d 430, 450 (4th Cir. 2005):

> The FCA also contains a savings clause: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. The presence of a savings clause counsels against a finding that Congress intended to sweep aside all state claims in a particular area. Indeed, at least two circuits have recognized in other contexts that § 414 precludes such a finding.

(C) *Missouri v. Holland*

Missouri v. Holland arose over an effort by the State of Missouri to prevent a U.S. game warden from attempting to enforce the Migratory Bird Treaty Act:

> This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. * * *

> To answer this question, it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because, by Article II, § 2, the power to make treaties is delegated expressly, and *by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.* If the treaty is valid, there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed. * * *
>
> *Here, a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power.* The subject matter is only transitorily within the State, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with.
>
> *Missouri v. Holland*, 252 U.S. 416, 430-431, 432, 435 (1920) (Emphasis added.)

The Supreme Court concluded that the MBTA was both constitutional and enforceable in the state. Here, the Second Circuit Court of Appeals affirmance of the District Court's decision is directly contrary to the essence of the Supreme

Court's determination and the legal principle behind it.

(D) *American Bird Conservancy v. FCC*

> The MBTA provides, with certain exceptions, that it shall be unlawful "to pursue, hunt, take, capture, [or] kill" any migratory bird. 16 U.S.C. § 703. The court has held that the MBTA applies to federal agencies. *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 885-86 (D.C.Cir. 2000). Petitioners contend that the Commission unlawfully "takes" migratory birds when birds die in collisions with Commission-licensed towers and sought to have the Commission comply with the MBTA "by taking steps to reduce or eliminate intentional or unintentional `takes' of migratory birds." Gulf Coast Petition at 20.
>
> *American Bird Conservancy v. FCC*, 516 F.3d 1027, 1031-1032 (D.C. Cir.2008)

There is no mention in the *American Bird Conservancy* case of any claim by the FCC that the MBTA is preempted by the FCC's cell tower regulations and does not apply to tower siting decisions. The D.C. Circuit logically concluded that MBTA applies to tower placement.

(E) The Department of Interior's Interpretation of MBTA Application to Tower Kills

In response to the *American Bird Conservancy* litigation, the FCC proposed an Antenna Structure Registration Program and invited comments from the public and government agencies (WT Docket Nos. 08-61 and 03-187). On January 14,

2011, the Department of the Interior's Division of Migratory Bird Management submitted written comments (set out in full in the Appendix at 86a). Key language describing the MBTA's application to tower kills, and the status of relevant scientific research, appears on page 2 of the DOI's comments:

> The Service now protects and manages 1,007 migratory birds (50 CFR 10.13, March 1, 2010). *Each time a protected bird strikes a communication tower and is killed or injured, the collision represents an unpermitted "take" under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703-712), a strict liability statute.* While yet to be validated in wild breeding birds in North America, radiation from cellular communication towers in Europe is being documented as a problem for nesting birds, resulting in reduced recruitment, poor chick survivorship and mortality around cellular communication towers where nesting is occurring (Balmori 2005, Balmori and Hallberg 2007, and Everaert and Bauwens 2007). Radiation at the same frequency and intensity as that used in cellular telephones in the U.S. has been validated in the laboratory as a problem for domestic chicken embryos, resulting in deaths (DeCarlo et al. 2002, Manville 2009). *If radiation is injuring or killing wild migratory birds, this represents yet another unpermitted "take" of protected species in the U.S.*
>
> (Appendix at pp.87a-88a)
> (Emphasis added.)

[Several of the bird studies mentioned by the DOI were submitted as hearing exhibits by Petitioner Jaeger in the Connecticut Siting Council proceedings that form the basis for this litigation.]

These interpretations of the MBTA fully support the treaties' non-discretionary application to state cell tower siting decisions. The important issue for this Court to decide on certiorari is whether these treaties are supreme law of the land in the face of the Telecommunications Act, or whether the TCA preempts these treaties as contended by the lower court.

POINT II

THE SECOND CIRCUIT'S RULING THAT A PRIVATE PLAINTIFF DOES NOT HAVE STANDING TO SEEK EQUITABLE RELIEF AGAINST STATE VIOLATIONS OF MBTA PRESENTS A FEDERAL QUESTION THAT NEEDS TO BE DECIDED AND SETTLED BY THIS COURT.

The District Court ruled, and the Circuit Court affirmed, that petitioner "lacks standing" to seek an injunction to prevent violations of the MBTA and BGEPA because she cannot invoke the APA to compel a state agency to comply with those laws:

> Private plaintiffs may, via the Administrative Procedure Act ("APA"), pursue claims against federal agencies for failure to adhere to the MBTA and BGEPA. *See* 5 U.S.C. § 701; *see also Fund for Animals v. Norton*, 374 F. Supp. 2d 91, 98 (D.C. Cir. 2001); *Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001); *Humane Society of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000). A private plaintiff, however,

> may not sue state or municipal agencies under the APA. *See* 5 U.S.C. § 701(b)(1) ("'agency' means each authority of the Government of the United States"); *see also Hunter v. Underwood*, 362 F.3d 468, 477 (8th Cir. 2004); *Western State University of California v. American Bar Ass'n.*, 301 F. Supp. 2d 1129, 1133 (C.D. Cal. 2004). *Because Jaeger lacks standing to enforce violations of the MBTA and BGEPA claims against a state entity and private company, her claims pursuant to those statutes must fail.*
>
> *Jaeger v. Cellco d/b/a Verizon Wireless and Connecticut Siting Council*, 2010WL 65730 (D. Conn.) (Emphasis added.) (25a-26a)

(A) State Officers

The D.C. Circuit has held that the availability of injunctions to block official actions in violation of MBTA applies to "state officers" as well as "federal agencies." See *The Humane Society of the United States, et al. v. Dan Glickman, Sec'y U.S. Dept of Agriculture*, et al., 217 F.3d 882, 885 (D.C. Cir. 2000):

> As § 703 is written, what matters is whether someone has killed or is attempting to kill or capture or take a protected bird, without a permit and outside of any designated hunting season. Nothing in § 703 turns on the identity of the perpetrator. *There is no exemption in § 703 for* farmers, or golf course superintendents, or ornithologists, or airport officials, or *state officers*, or federal agencies.
>
> *Ibid.* (Emphasis added.)

The D.C. Circuit particularly stressed the obligations to honor U.S. treaties:

> The Migratory Bird Treaty Act implements the Treaty of 1916. Treaties are undertakings between nations; the terms of a treaty bind the contracting powers. After ratification of the Treaty, President Woodrow Wilson affixed his signature to it and made it public, "to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof." 39 Stat. 1705 (italics added). If one year later, in 1917, Canadian authorities had started slaughtering eider ducks, no one would doubt that Canada would be guilty of violating Article IV of the Treaty, which protects these ducks. If some agency of the federal government did the same in Alaska, the United States too would be in violation of the Treaty. *There is no reason to treat the Act differently from the Treaty since the legislation was meant to "give effect to the convention between the United States and Great Britain for the protection of migratory birds," ch. 128, 40 Stat. 755, 755 (1918).*
>
> *Ibid.* at 217 F.3d 882, 887
> (Emphasis added.)

(B) Petitioner's Standing

Jaeger has pleaded her individual rights as a birdwatcher; as a Native American religious believer and practitioner; as mother of minor children who share her beliefs; and as an owner of property visited by large numbers of migratory birds. These claims are undisputed.

Migratory birds seek respite in trees and grasses on Jaeger's property. The Migratory Bird Treaty Act of 1918 prohibits the taking of all such listed species or their parts, including feathers, eggs and nests from her property. Jaeger has an individualized specific and concrete personal injury and interest in this case and has asked the federal courts to uphold and enforce such treaties when they are violated and to enjoin threatened violations before they occur, pursuant to Article III (and Article VI).

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.
>
> *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000)

The threat of tower kills of migratory birds at the tower site abutting Ms. Jaeger's property, combined with the adverse RF radiation impacts on bird nesting, mating, hatching, and habitat food sources on Petitioner Jaeger's property establishes her standing to seek an injunction under the mandatory provisions of the MBTA. The D.C. Circuit Court of Appeals recognized such "injury in fact" as grounds for standing in *Fund for Animals v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006):

> In *Hill*, we held that the plaintiff, *a Maryland property owner who enjoyed the presence of mute swans on her property, satisfied the constitutional prerequisite for invoking federal jurisdiction—namely, injury in fact fairly traceable to the conduct of the defendants and redressable by judicial relief*. 275 F.3d 98, 102-

> 03 (D.C.Cir. 2001). The same is true here. Two of the individual plaintiffs are Maryland residents with mute swans on their property. Under *Hill*, those plaintiffs suffer injury in fact because of the Service's designation of the mute swan as a species not protected by the Migratory Bird Treaty Act. That action freed Maryland to kill a portion of the Chesapeake Bay mute swan population, which would include the swans on those residents' property. Judicial invalidation of the designation would restore protection to the mute swan and make Maryland's plan unlawful. The Maryland plaintiffs have standing.
>
> *Ibid.* at p. 876, citing *Hill v. Norton*, 275 F.3d 98 (D.C.Cir. 2001) (Emphasis added.)

(C) Equitable Powers

The APA, which applies only to federal agencies, is not the only avenue available to citizens to enforce the MBTA. Far more significant and effective is the federal courts' inherent equitable power to enforce non-discretionary ministerial statutory mandates through injunction and *mandamus*. Under the Supremacy Clause, state compliance with U.S. treaties is mandatory. The nature and extent of the equitable power of courts is discussed in the Supreme Court decision *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893):

> As observed by Mr. Justice Bradley in *Board v. McComb*, 92 U. S. 531, 541: 'But it has been well settled that when a plain, official duty, requiring no exercise of discretion, is to be performed, and performance is refused, *any*

> *person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.* In such cases the writs of mandamus and injunction are somewhat correlative to each other.'
>
> *Ibid.*, pp. 170-172 (Emphasis added.)

The Department of the Interior U.S. Fish and Wildlife Service points out in its FCC comments on migratory bird deaths caused by cell tower strikes that the MBTA is a "strict liability statute." (Point I (E) *supra*.)

(D) Jaeger's Federal Rights

The presence of large numbers of MBTA-listed migratory birds on and close to Jaeger's home and property is undisputed by the Connecticut Siting Council, by Cellco, and by their environmental experts. Under the Fourteenth Amendment and the cases following *Missouri v. Holland*, *supra*, Dina Jaeger has all of the rights and privileges of a citizen of the United States to the protection of migratory birds under the MBTA and the international treaties with Canada, Mexico, Japan and Russia.

Dina Jaeger's federal privileges and immunities, protected under the Fourteenth Amendment, necessarily include her right as a U.S. citizen not to be deprived of the benefits of the MBTA and

Migratory Bird Treaties by state agency action authorizing a private telecommunications business to disregard those treaties and federal statutes. (See *In Re Quarles and Butler*, 158 U.S. 532, 536-537 (1895), citing *Logan v. United States*, 144 U. S. 293 (1892)) These rights, privileges and immunities include (1) federal protection of migratory birds that nest and visit the habitats on the Jaeger property and give Mrs. Jaeger and her children the pleasure and inspiration of close contacts with nature, birds and wildlife; and (2) Mrs. Jaeger's First Amendment right to the free exercise of Native American traditional religious ways, beliefs and customs, that depend on presence and co-existence with birds and other wildlife in their natural setting.

State Agency Obligation Under A Federal Scheme

The main issue here is whether a state agency may disregard international treaties and federal legislation in granting a permit to a private business corporation to erect a cell tower emitting RF emissions in a migratory bird flyway for commercial gain, in total disregard of potential tower kills and other adverse effects on the propagation, nesting, embryo-development and habitat of migratory birds protected by Federal law and treaties.

Petitioner Jaeger is not seeking to enforce criminal sanctions under the Migratory Bird Treaty Act ("MBTA") after birds have been killed, but rather is seeking to prevent the unnecessary deaths of birds by enjoining the State agency from disregarding the U.S. treaty with Canada and

three other nations—rendering Federal and International law, intended to protect these birds, meaningless.

State ratification of the 1789 Federal Constitution meant state acceptance of express limitations over state authority in the realm of treaties. Article I, section ten provides: "no State shall enter into any Treaty, Alliance, or Confederation" and "no State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State or with a foreign Power."

This preeminence of Federal authority was reinforced by the Supremacy Clause of Article VI:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land*; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> (Emphasis added.)

The MBTA is a Congressional enactment intended to implement the protective purpose and goals of the Migratory Bird Treaties, and to prevent contrary state actions. See *Massachusetts Association of Health Maintenance Organizations, Plaintiff, Appellee, v. Linda Ruthardt, Commissioner of Insurance, Defendant, Appellant,* 194 F.3d 176 (1st Cir. 1999).

Petitioner Jaeger is a citizen of the United States and her federal privileges and immunities

include protections under the Migratory Bird treaties. Federal acts to implement those treaties may not be disregarded or frustrated by a state or local authority. Where a conflict exists, Federal law trumps state law:

> Consistent with that command, we have long recognized that state laws that conflict with federal law are "without effect."
>
> *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981)

2001 Executive Order Reaffirming Migratory Bird Protection

President Clinton's 2001 Executive Order No. 13186 noted that migratory birds are not only of great economic value to this and other countries, but that "enjoyment" of birds is a protection guaranteed under the treaties, and, along with the birds' ecological and economic value, is a "shared resource" of "critical importance":

> They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. * * * *These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats*, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions

> with respect to the United States. This Executive Order directs executive departments and agencies to take certain actions to further implement the Act.
>
> (Emphasis added.)

The purpose of the 1999 amendment to the MBTA (Pub. L. 106–108, Nov. 24, 1999, 113 Stat. 1491) was primarily the preservation of bio-diversity. The explicit purpose of that amendment was "[t]o assure the long-term conservation of mid-continent light geese and the biological diversity of the ecosystem upon which many North American migratory birds depend."

In a 2001 dissent to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps. of Engineers*, a case that weakened the statutory safeguards against toxic water, Justice Stevens, along with Justices Souter, Ginsburg and Breyer, described the history of the MBTA protections as follows:

> In addition to the intrinsic value of migratory birds, see *Missouri v. Holland, 252 U.S. 416*, 435 (1920) (noting the importance of migratory birds as "protectors of our forests and our crops" and as "a food supply"), *it is undisputed that literally millions of people regularly participate in birdwatching* and hunting and that those activities generate a host of commercial activities of great value. * * *
>
> The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce. Cf. *Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941*, 953 (1982) (holding water to be an "arti-

> cle of commerce"). Migratory birds, and the waters on which they rely, are such resources. Moreover, *the protection of migratory birds is a well-established federal responsibility. As Justice Holmes noted in Missouri v. Holland, the federal interest in protecting these birds is of "the first magnitude."* 252 U.S., at 435. *Because of their transitory nature, they "can be protected only by national action." Ibid.*
>
> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps. of Engineers*, 531 U.S. 159, 194-196 (2001) (Dissent, J. Stevens) (Footnote omitted. Emphasis added.)

POINT III

THE SECOND CIRCUIT RULING ADDS TO THE CONTRADICTORY SPLIT IN FOUR CIRCUITS OVER APPLICABILITY OF THE MIGRATORY BIRD TREATY ACT TO GOVERNMENT AGENCIES

Along with the U.S. Fish and Wildlife Service (see 2(E), *supra*), telecom industry representatives have also filed Comments on the FCC's tower registration proposal described above, using the joint industry name of "Infrastructure Coalition." In their FCC Comments the industry representatives argue that the MBTA does not apply to the FCC. In support of their argument, the Infrastructure Coalition points out the conflict that already exists between the D.C. Circuit, the 8th Circuit, and the 11th Circuit over the enforceability of MBTA against federal agencies. According to the Infrastructure Coalition:

2. The FCC Is Not Subject to the MBTA

No court has held that independent agencies may adopt regulations to implement the MBTA. *Moreover, there is a split among the circuits as to whether government agencies are even subject to the MBTA in carrying out their statutory responsibilities.* Some proponents of regulation rely on a decision on the minority side of the split, the D.C. Circuit's *Glickman* decision. [*Humane Society of the United States v. Glickman*, 217 F.3d 882, 887-88 (D.C. Cir. 2000)] without any meaningful analysis of the other circuit's decisions. *Glickman*, however, does not support FCC regulation of avian mortality. Nothing in that decision addresses whether government agencies other than DOI may regulate avian mortality, or whether such an agency is required to consider the effects of actions by its regulatees on birds. * * * The court acknowledged that both the Eighth Circuit, in *Newton County*, and the Ninth Circuit, in *Seattle Audubon* [*Seattle Audubon Society v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991)], held that the MBTA does not apply to actions that only indirectly lead to avian deaths.

"Infrastructure Coalition" Reply Comments on WT Docket No. 03-187 dated May 23, 2007 at pages 43-44. (Footnotes omitted.) (Emphasis added.)

The Second Circuit decision adds a fourth Circuit to this conflict among Circuit courts—indicating forcefully why the Supreme Court should speak on the subject instead of leaving the 2nd, 8th, 11th and D.C. Circuits at odds on this

increasingly important issue affecting our commitments to America's treaty partners and to the protection of a major segment of the world's shrinking avian population. The issue is too important to allow such disparate judicial determinations to spawn more confused progeny. As Justice Oliver Wendell Holmes, Jr. wrote in the Missouri decision:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with.
>
> *State of Missouri v. Holland*, 252 U.S. 416, 435 (1920)

CONCLUSION

The Second Circuit's order affirming the District Court's decision in the present case conflicts with at least two other federal court opinions—one in the Supreme Court, and the other in the D.C. Circuit Court of Appeals—and adds to the growing number of inconsistent outcomes among four Circuit Courts of Appeal. Certiorari should be granted to end the confusion and make it clear both that injured persons have standing to sue to enjoin state agencies from taking actions in violation of the strict liability Migratory Bird Treaty Act, and that the Act applies to cell tower siting and other harmful state actions that violate the nation's long-standing international treaties to protect migratory birds as a vital international natural resource.

Respectfully submitted,

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GABRIEL NORTH SEYMOUR
On the brief

APPENDIX

Court of Appeals Summary Order

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 10-1347-cv
December 7, 2010

DINA JAEGER,
Plaintiff-Appellant,
—v.—
CELLCO PARTNERSHIP, d/b/a VERIZON WIRELESS, CONNECTICUT SITING COUNCIL,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut (Underhill, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said district court be and hereby is **AFFIRMED**.

Whitney North Seymour, Jr., New York, NY; Gabriel North Seymour, Falls Village, CT, for Dina Jaeger.

Joshua S. Turner, Andrew G. McBride, Brendan J. Morrissey, Wiley Rein LLP, Washington, DC; Bradford S. Babbitt, Robinson & Cole LLP, Hartford, CT, for Cellco Partnership.

Robert L. Marconi, Assistant Attorney General of Connecticut, New Britain, CT, for Connecticut Siting Council.

Present: AMALYA L. KEARSE, WALKER, ROSEMARY S. POOLER, Circuit Judges.

SUMMARY ORDER

Dina Jaeger appeals from the district court's judgment granting Defendants' motions to dismiss all six claims in Jaeger's complaint. Jaeger's complaint alleged, *inter alia*, violations of the International Migratory Bird Treaty, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Telecommunications Act ("TCA"), resulting from the grant by the Connecticut Siting Council ("Council") of a Certificate of Environmental Compatibility and Public Need for the Construction, Maintenance and Operation of a personal wireless service facility to Cellco Partnership ("Cellco"). Jaeger principally requested injunctive and declaratory relief. We

assume the parties' familiarity with the underlying facts, procedural history, and issues presented on appeal.

We review a district court's grant of a motion to dismiss *de novo*, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. *See Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir.2008).

Having conducted a *de novo* review of the record in light of the controlling substantive principles, we affirm the district court's dismissal of the first five claims in Jaeger's complaint for substantially the same reasons stated by the district court.

With respect to the sixth claim in Jaeger's complaint, we hold that Jaeger lacks standing to sue for a declaratory judgment that the funding scheme of the Council, as set forth in Section 16-50v of the General Statutes of Connecticut, violates due process. Jaeger fails to allege any redressable injury that is "fairly traceable" to conduct by either defendant. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Courts are barred by the TCA from ordering the Council to deny Cellco's siting application on the grounds asserted by Jaeger.

We have considered Jaeger's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**. Jaeger's renewed motion to strike irrelevant matter is **DENIED** in its entirety.

District Court's Opinion and Order

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 3:09CV567 (SRU)

March 16, 2010

DINA JAEGER,

Plaintiff,

—v.—

CELLCO PARTNERSHIP d/b/a Verizon Wireless, and The Connecticut Siting Council,

Defendants.

Gabriel North Seymour, Gabriel North Seymour, Falls Village, CT, Whitney North Seymour, Jr., New York, NY, for Plaintiff.

Andrew G. McBride, Brendan J. Morrissey, Joshua S. Turner, Wiley Rein LLP, Washington, DC, Bradford S. Babbitt, Craig A. Raabe, Robinson & Cole, Hartford, CT, Robert L. Marconi, Attorney General's Office, New Britain, CT, for Defendants.

RULING AND ORDER

STEFAN R. UNDERHILL, *District Judge.*

Dina Jaeger brought this action to enjoin the March 12, 2009 decision and order of the Connecticut Siting Council ("Council") granting Cellco Partnership d/b/a Verizon Wireless ("Cellco") a Certificate of Environmental Compatibility and Public Need for the Construction, Maintenance and Operation ("Certificate") of a personal wireless service facility ("cellular tower") at 188 Route 7, Falls Village, Connecticut. Jaeger's six-count complaint alleges, *inter alia*, violations of the International Migratory Bird Treaty, the Migratory Bird Treaty Act ("MBTA"), the Bald and Golden Eagle Protection Act ("BGEPA"), the Telecommunications Act ("TCA"), and the 10th and 14th Amendments to the U.S. Constitution.

In her first and second claims for relief, Jaeger alleges that the construction and operation of the cellular tower will result in harmful radio frequency emissions ("RF emissions") causing impermissible harm to protected fowl in violation of the MBTA and the BGEPA. She also claims that the Council violated Section 704(a) of the Telecommunications Act ("TCA"), codified at 47 U.S.C. § 332(c)(7), in rejecting her proposal to modify or relocate the personal wireless facility without an adequate explanation. *See* 47 U.S.C. § 332(c)(7)(B)(iii). Jaeger's third claim for relief alleges that the construction and operation of the cellular tower will result in harmful RF emissions causing impermissible harm to humans. She seeks a declaratory judgment that "under 47 U.S.C. § 332(c)(7)(B)(iv), in making decisions regarding

the placement of [cellular towers], States and local governments in the performance of their police power responsibilities to protect the health, safety, and welfare of their citizens are not prohibited from taking into account non-thermal biological effects of RF radiation to the extent that they are not presently covered by the FCC's safety regulations." Her fourth claim makes additional allegations concerning human health and she seeks a declaratory judgment "defining her constitutional right to protect herself and her children from government approval of potentially harmful wireless RF radiation from cell towers." Jaeger's fifth claim for relief alleges that the Council violated the criteria set forth in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir.1999), by failing to articulate a public need for the cellular tower. Her sixth claim for relief seeks a declaratory judgment stating that Conn. Gen.Stat. § 16-50v, the statute setting forth the funding scheme for the Council, is unconstitutional.

Defendants move to dismiss Jaeger's claims on several grounds.[1] First, defendants maintain that Jaeger failed to exhaust her state administrative remedies, and therefore the court should abstain from considering all of her claims. Second, defendants claim the Council is preempted from considering the environmental effects of radio-

[1] Defendants filed separate motions but move for dismissal on substantially similar bases, and incorporate each others arguments, therefore I consider their motions together. The Council's motion is treated as a motion for judgment on the pleadings because the Council had already filed its answer.

frequency emissions under the TCA, and therefore Jaeger's first through fourth claims for relief must fail. Additionally, defendants argue that Jaeger lacks standing under the MBTA and BGEPA to bring her first two claims for relief. Lastly, defendants maintain that Jaeger's fifth and sixth claims for relief fail as a matter of law. Jaeger filed a cross-motion for summary judgment in opposition to the motions to dismiss.

I heard oral argument on the motions on October 7, 2009. For the following reasons, defendants' motions to dismiss are **granted.** Because defendants' motions to dismiss are granted, I need not reach the merits of Jaeger's motion for summary judgment, and therefore it is **denied as moot.**

I. *Standard of Review*

Defendants move to dismiss the complaint both for lack of standing and for failure to state a claim. The party who seeks to exercise the jurisdiction of the court bears the burden of establishing the court's jurisdiction. *Thompson v. County of Franklin,* 15 F.3d 245, 249 (2d Cir.1994). To survive a motion brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a plaintiff must clearly allege facts demonstrating that the plaintiff is a proper party to seek judicial resolution of the dispute. *Id.* Although the plaintiff bears the ultimate burden of establishing jurisdiction by a preponderance of the evidence, "until discovery takes place, a plaintiff is required only to make a prima facie showing by pleadings and affidavits that jurisdiction exists." *Koehler v. Bank of Bermuda,* 101 F.3d 863, 865 (2d Cir.1996). "When considering a party's standing,

we 'accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Thompson*, 15 F.3d at 249 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). If a plaintiff has failed to allege facts supportive of standing, it is within the court's discretion to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of standing. *Id.*

When deciding a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiff, and decide whether the plaintiff has set forth a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007); *Iqbal v. Hasty*, 129 S.Ct. 1937 (2009); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir.1996).

II. *Factual Background*

The following facts are taken from Jaeger's complaint ("Compl.") and for the purposes of this ruling are assumed to be true. On March 12, 2009, the Council granted Cellco the Certificate for the construction, maintenance and operation of a cellular phone tower located at 188 Route 7 South, Falls Village, Connecticut. (Compl.3.) Jaeger was granted intervenor status by the Council in the certification proceeding. *Id.* Jaeger is the mother of two minor children and lives 1290 feet in a straight line from the proposed cellular tower. (Compl.5.) She is also co-owner of undeveloped land located across Route 7 from the cellular

tower site. (Compl.5-6.) The market value of both properties would be adversely impacted by the construction of the tower. (Compl.6.) Jaeger is an active recreational birdwatcher and, as a Native American, she draws spiritual inspiration and religious guidance from the sightings of bald eagles and other wildlife. *Id.*

Cellco is licensed by the FCC to operate a wireless communication system in the state of Connecticut. *Id.* Cellco acquired Alltel's cellular license for Litchfield County and a license to provide service in the 700MHz frequency band for 4G wireless service. *Id.* The Council granted Cellco the certificate without a showing of the potential environmental impact. *Id.* The Council has exclusive jurisdiction to determine the placement of wireless telecommunications facilities in Connecticut. *See* Conn. Gen.Stat. § 16-50g.

The Council held a public hearing on July 1, 2008, which was continued until July 31, 2008. (Compl.6.) At the hearing, Jaeger introduced evidence to the Council that wireless transmission facilities negatively impact persons and wildlife living near them. (Comp.12-13.) Jaeger submitted a document to the Council showing that more than two hundred migratory birds have been sighted in the area near the proposed cellular tower site. (Comp.7.) The Council rejected the studies submitted by Jaeger concerning cell towers and their effects on the health of birds. (Compl. 8 -9.) Jaeger also submitted evidence that the proposed cellular tower location would violate the BGEPA. She provided the Council with the Balmori Study stating that "animals are very sensitive electrochemical complexes that communicate with their environ-

ment through electrical impulses. . . . The low intensity pulsed microwave radiation from cell-sites produces subtle athermal influences on living organisms . . . research has shown such effects on the living organisms at molecular and cellular levels on immune processes, in DNA, on the nervous, cardiac, endocrine, immune and reproductive systems. . . ." (Compl.8). She also submitted to the Council proposed findings of fact dated September 2, 2008, which included the following statement on bird health effects: "Scientific studies offered in evidence by Intervenor show that the operation of cell transmission antennas can: (a) interfere with migratory birds' natural navigation systems causing tower strikes and fatalities after dark; (b) prevent migratory bird nesting and reproduction within 200 meters of cell towers; and (c) cause infertility in small animal food sources in migratory bird habitats." (Compl. 9, internal citations omitted).

Similarly, Jaeger introduced a number of studies that demonstrate that humans living near cellular towers experience headaches, vertigo, visual disturbances, irritability, loss of memory, dizziness, restlessness, lethargy, and other ailments. (Compl.13-14 .) The FCC guidelines establishing safe RF emission levels are no longer accurate. (Compl.16). The Council approved Cellco's application without a finding of a pubic need, and despite the evidence that the proposed site is served by other cellular service providers. (Compl.18-19).

The Council is a self-funded agency and recovers administrative fees via an assessment levied against those who provide communications ser-

vices and those who have come before the council in the preceding year. The Council also charges fees for each application for a certificate for a facility. Current payment levels for Council members include a per diem fee of $150 for attending hearings, not to exceed $12,000 a year. The Council held a Christmas party in 2008 and invited Cellco's attorney and corporate representative. (Compl. at 22-23.)

III. *Discussion*

A. Abstention

Jaeger has also appealed from the Council's decision to the Connecticut Superior Court. Defendants argue that Jaeger's federal claims concern ongoing state proceedings, that the siting of cellular towers is an important state function, and that the state courts are courts of general jurisdiction. Therefore, defendants argue, the federal court forum is unnecessary and duplicitive. For those reasons, defendants urge me to abstain from hearing this matter. Federal courts, however, are under no duty to abstain simply because of the pendency of parallel litigation. The circumstances of the instant action are not exceptional and do not warrant abstention. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Additionally, where a plaintiff seeks declaratory relief with respect to federal rights, as Jaeger does here, the court's exercise of jurisdiction is wholly discretionary. *Wilton v. Seven Falls*, 515 U.S. 277 (1995); *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942). Accordingly, I decline to abstain from exercising jurisdiction in this case.

B. The Effects of RF Emissions

Defendants' maintain that, to the extent that Jaeger's first four claims for relief attack the Council's failure to deny Cellco's application on the basis of RF emissions, Jaeger fails to state a claim upon which this court can grant relief because the Section 704 of the TCA preempts the Council's authority to render siting decisions on the basis of RF emissions. *See* 47 U.S.C. § 332(c)(7)(B)(iv). In her complaint Jaeger maintains that the Council failed to consider the evidence she presented concerning the health effects of RF emissions on humans and wildlife. Additionally, she claims that the FCC's regulation of RF emissions is outdated, thus nullifying any preemptive effect of the TCA. She further argues that, to the extent the Council is preempted from regulating cellular tower placement on the basis of RF emissions, the Council is not preempted from rendering a siting decision based on the impact of RF emissions on migratory birds. In light of the studies presented, she argues that the Council erred in failing to adopt her proposed finding of fact that the cellular tower should be relocated or co-located with existing towers to prevent harm from RF emissions. Because Jaeger's first four claims challenge the Council's siting determination on the basis of the effects of RF emissions, they fail as a matter of law; the Council is preempted by the TCA from denying an application on the basis of the effects of RF emissions that fall within the permissible range set by the FCC.

1. *The Telecommunications Act of 1996*

Congress enacted the TCA "to provide a pro-competitive, de-regulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition. . . ." *Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.2d 490, 493 (2d Cir.1999) (quoting H.R. Conf. Rep. No. 104-458, at 206 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 124.) The TCA sets forth a regulatory scheme for state and local authorities responsible for determining whether a cellular phone tower may be built. *See* 47 U.S.C. § 332(c). Section 332(c)(7)(A) gives local and state zoning authorities general authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities." The delegated authority to regulate cellular towers is limited, however, and there "is no doubt that Congress may preempt state and local governments from regulating the operation and construction . . . of personal wireless communications facilities." *Cellular Phone Taskforce v. FCC,* 205 F.3d 82, 96 (2d Cir.2000), *cert. denied,* 531 U.S. 1070 (2001).

Indeed, 47 U.S.C. § 332(c)(7)(B) circumscribes the regulatory authority of state and local governments, providing that the regulation of the placement, construction, and modification of cellular towers by any State or local government shall: (1) not unreasonably discriminate among providers; (2) not prohibit or have the effect of prohibiting the provision of personal wireless ser-

vices; (3) act on a request within a reasonable period of time; and (4) render a denial in writing and supported by substantial evidence contained in a written record. Additionally, subsection 332(c)(7)(B)(iv) preempts state and local governments from regulating personal wireless service facilities on the basis of health effects of RF emissions. *See Cellular Phone Taskforce*, 205 F.3d at 96. Specifically, section 332(c)(7)(B)(iv) states that "[n]o state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."[2] Further, section 332(c)(7)(B)(v) dictates that "any person adversely affected by an act or failure to act by a State or local government" that is inconsistent with section 332(c)(7)(B)(iv) may petition the FCC for relief.

In *Cellular Phone Taskforce*, the Court addressed challenges to two FCC final opinions and orders. The first established guidelines for health and safety standards of RF emissions, and the second set forth compliance guidelines under the National Environmental Policy Act (NEPA). The Court held, in part that, with respect to setting safety standards, the FCC acted reasonably in relying on the American National Standards Institute (ANSI) and National Council on Radia-

[2] To the extent that the FCC promulgates orders and regulations under the TCA, it is established that "the FCC has broad preemption authority" under the TCA. *See City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *see also Cellular Phone Taskforce*, 205 F.3d at 96.

tion Protection and Measurements (NCRP), and in interpreting the preemption provision of the Telecommunications Act of 1996, and that the preemption provision of the Telecommunications Act of 1996 did not violate the Tenth Amendment. *See generally Cellular Phone Taskforce*, 205 F.3d at 82. The Court stated that Section 332(c)(7)(B)(iv) "preempt[s] state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe." *Id.* at 88; *see also Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417 (2d Cir.2002)

2. *Human Health Effects*

Jaeger does not dispute that the TCA preempts the Council from making siting decisions based on human health effects of RF emissions. (Doc. 20 at 7). Instead, she maintains, in her third and fourth claims for relief, that in light of the studies provided to the Council, it is evident that the FCC's established guidelines for RF emissions are outdated and fail to account for non-thermal RF emissions. Accordingly, she argues, the Council was not preempted from denying Cellco's application on the basis of human health effects of non-thermal RF emissions. Additionally, she alleges that, even if the TCA preempts the Council from considering the human health effects of RF emissions, up-to-date research "invalidates and nullifies the preemption clause by removing its underlying premise-the FCC guidelines must provide 'adequate safeguards.'" (Compl.16-17.) For the fol-

lowing reasons, Jaeger's arguments fail, and defendants' motion to dismiss claims 3 and 4 is granted.

It is clear that the FCC has considered the effects of non-thermal RF emissions. The FCC promulgated exposure limits that are set forth in 47 C.F.R. § 1.1310, Table 1. The parties do not dispute that Cellco's proposed tower will not exceed the RF emission limits established by the FCC. The recommended guidelines consider exposure limits published by the National Council on Radiation Protection and Measurement (NCRP) and the American National Standards Institute (ANSI). *See* 47 C.F.R. § 1.1310. The FCC relied on findings by the NCRP and ANSI in issuing the Second Order, 12 F.C.C. Rcd. 13494 at p. 31, 1997 WL 522796, which states:

> [the] guidelines are based on recommendations of expert organizations and federal agencies with responsibilities for health and safety. It would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and th[en] adopt stricter standards than those advocated by federal health and safety agencies. This is especially true for such controversial issues as non-thermal effects and whether certain individuals might be "hypersensitive" or "electrosensitive."

The ANSI concluded that "no reliable scientific data exist indicating that [n]onthermal . . . exposure may be meaningfully related to human health." The NCRP found that the existence of

non-thermal effects "is clouded by a host of conflicting reports and opinions." *See Cellular Phone Taskforce,* 205 F.3d at 90.

The NCRP and ANSI findings were upheld in *Cellular Phone Taskforce,* where petitioners, as Jaeger does here, argued that the FCC guidelines were outdated and failed to account for non-thermal effects of the RF emissions, and therefore were arbitrary and capricious. The Second Circuit held that the FCC, relying on the NCRP and ANSI, had considered the non-thermal effects of RF emissions, and the FCC's reliance on the challenged findings was not arbitrary and capricious. *Id.* The Court concluded that, even though experts may disagree, the FCC is the entity with the express authority to regulate acceptable RF emissions levels for cellular tower facilities. The "argument that the FCC should create greater safety margins in its guidelines to account for uncertain data is a policy question, not a legal one." *Id.* The Court stated that "an agency confronted with scientific uncertainty has some leeway to resolve the uncertainty by means of more regulation or less." *Id.* at 91.

At oral argument, Jaeger suggested that the Council, in light of the evidence presented to it concerning human health effects, should have *sua sponte* denied Cellco's application on any other available ground. Because the TCA does not act as a complete bar to local and state regulatory authority, Jaeger is correct that the Council could have denied Cellco's application on other grounds. The Second Circuit has held that the Council is not prohibited from considering other factors in siting and has discretion to approve or deny a pro-

posal for reasons other than the effects of RF emissions. *See* 47 U.S.C. § 332(c)(7)(A); *Cellular Phone Taskforce*, 205 F.3d at 96.

The Second Circuit and, recently, the Ninth Circuit have upheld local and state government regulation of towers under Section 332(c)(7)(A). *See Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir.2009) (holding that a denial of an application for a wireless transmission facility on aesthetic grounds was permissible under the TCA); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir.2002) (holding that a lease agreement restricting RF emissions was permissible under the TCA). In *Mills*, a wireless provider (Sprint) sought to compel a school district to allow it to place a tower on a high school roof pursuant to an *existing* lease agreement. The parties disputed the terms of the lease agreement. Sprint had informed the school district that it needed to change the specifications of the proposed tower and as a result the RF emissions would be higher than agreed upon but still remain with the FCC regulated limits. The school district objected to that change. The District Court held that, under the TCA and *Cellular Phone Taskforce*, the school district could not regulate the tower on the grounds of RF emissions and enjoined the school district. After engaging in a thorough discussion of *Cellular Phone Task Force* and the reach of TCA's preemption, the Second Circuit held, on appeal, that the TCA does indeed preempt regulation on the basis of RF emissions, but it does not preempt mutually agreed upon provisions in a lease agreement, even if the terms of the lease agreement embodied stricter RF emis-

sion limits than those provided by the FCC. Nonetheless, the discussion concerning *Cellular Task Force* reiterated the Court's previous position that local and state governments cannot make siting determinations based solely on the effects of RF emissions. *See also Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490 (2d Cir.1999) (holding that, where the record shows that human health effects were the only basis for denying a cellular tower application, the denial is overturned despite local government's claims the denial was based on aesthetic and property value concerns).

Here, Jaeger specifically sought a siting decision based on potentially adverse health effects of RF emissions. It is clear that the TCA preempts local and state regulation of cellular towers solely on the basis RF emissions. Furthermore, there is no support for her assertion that the Council is obligated to consider all possible bases for denying an application, even if those bases are not raised by a petitioner. Because state and local authorities may not make siting decisions based on fears that RF emissions from cellular towers pose environmental risks, so long as the RF emissions fall within FCC established guidelines, *Cellular Phone Taskforce v. FCC,* 205 F.3d at 96, claims one, two, three and four of Jaeger's complaint fail.

3. *Jaeger's Proposal*

In her first claim, Jaeger alleges that she and others proposed that Cellco's personal wireless service facilities be placed at a "different and safer location in order to protect the schoolchildren, nearby residents, migratory birds, eagles and

other threatened species." (Compl. 10 at ¶ 24). The Council's denial of that proposal without a written decision and adequate explanation, Jaeger maintains, violated section 332(c)(7)(B)(iii). *Id.* Section 332(c)(7)(B)(iii) provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

Jaeger's claim under section 332(c)(7)(B)(iii) fails for several reasons. First, Jaeger's complaint concerns the *granting* of Cellco's application and not the *denial* of her proposal; Jaeger did not propose that a tower be constructed in any particular location, only somewhere other than where Cellco sought to place one. Recently, a court of this circuit observed that section 332(c)(7)(B)(v) "limits the right to bring a federal claim to persons affected by a narrow set of actions by a state or local planning board." *See Drago v. Garment*, 2010 WL 769692 at *3 (S .D.N.Y. March 2, 2010). Noticeably absent from section 332(c)(7)(B)(v) is any language allowing one to "bring an action in federal court for the adverse affects flowing from the granting of a request to construct a personal wireless service facilities." *Id* . at *4.

Second, to the extent that Jaeger presented the Council with a proposal to relocate Cellco's cellular tower, it is clear that Jaeger is not a provider of wireless services under the terms of the TCA. Section 332(c)(7)(B) governs the "regulation of the placement, construction, and modification of personal wireless service facilities. . . ." The term "personal wireless services" is defined as "com-

mercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." *See* 47 U.S.C. § 332(c)(7)(C)(i). The term "personal wireless service facilities" as defined in section 332(c)(7)(C)(ii) "means facilities for the provision of personal wireless services." Section 332(c)(7)(B)(iii) requires only a decision in writing where a denial to place, construct, or modify a personal wireless service facilities has been issued. Jaeger is not a commercial mobile service, an unlicensed wireless service nor a common carrier wireless exchange service. As such, she is not an entity making a proposal to place, construct, or modify a personal wireless service facility as set forth in section 332(c)(7)(C)(ii). Jaeger seeks only to force Cellco relocate an already proposed facility on the basis of studies concerning the effects of RF emissions on human and wildlife health.

Lastly, even if Jaeger could bring a claim under section 332(c)(7)(B)(iii) because she arguably proposed a "modification" by requesting the tower be relocated to a place not near her home, that claim is based on the argument that the Council failed to consider the safety of the environment around the tower, specifically, the effects of RF emissions. *See* Compl. 10 at ¶ 24. As discussed above, the Council is preempted under the TCA from basing a siting decision on the effects of RF emissions. Thus, Jaeger's claim that the Council rendered a siting decision despite the evidence in the record concerning the effects of RF emissions and that the Council improperly denied her request to modify or relocate Cellco's personal wireless service facility to a safer location necessarily fails.

4. *"Environmental Effects"*

At oral argument and in her opposition papers, Jaeger conceded that the TCA does preempt the regulation of cellular transmission towers on the basis of RF emissions. (Doc. # 20 at 7.) She maintains, however, that the term "environmental effects" in section 332(c)(7)(B)(iv) limits the FCC's regulation of RF emissions to human health effects and, therefore, the Council is free to consider the health effects of RF emissions on migratory birds and other wildlife. Plaintiff's interpretation of section 332(c)(7)(B)(iv) is flawed for a number of reasons. First, a plain reading of the statute makes clear that the TCA preempts local and state authorities from regulating the placement of cellular towers on the basis of the environmental effects of RF emissions. Second, the reading Jaeger seeks would grant the Council authority to regulate cellular tower siting on the basis of RF emissions, a reading wholly irreconcilable with the preemptory language of the TCA and the holding in *Cellular Phone Taskforce*.

When asked to construe a statute, the court begins with its plain language. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."). The court must first determine if the language at issue has a plain

and unambiguous meaning. *See Robinson v. Shell Oil Co .*, 519 U.S. 337, 340 (1997). If so, the court's inquiry ends. *See In re Venture Mortgage Fund, L.P.*, 282 F.3d 185, 188 (2d Cir.2002) ("[I]it is axiomatic that the plain language of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms.").

The term "environmental effects" is defined as the "natural or artificial disturbance of the physical, chemical, or biological components that make up the environment." *See Black's Law Dictionary*, 238 (2d ed.2001).[3] There is no dispute that migratory birds, bald eagles and other wildlife are biological components of the environment. The court recognizes, however, that no other court has explicitly considered whether the term "environmental effects" includes effects beyond those on human health. *See Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir.1999) (holding that environmental effects include human health effects.) A review of the regulations under which the FCC sets acceptable RF emission levels and determines environmental compatibility of transmission facilities makes plain that the FCC does indeed consider the health effects of RF emissions on wildlife. The FCC, in approving the construction of a facility, is required to consider

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[3] Although not defined in section 332, Congress promulgated the following definition of "adverse environmental effect" in its regulation of air pollution: "the term 'adverse environmental effect' means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." *See* 42 U.S.C. § 7412.

the environmental impact of facilities located: in an officially designated wilderness area, in a wildlife preserve, where they may affect listed threatened or endangered species or designated critical habitats, or where they are likely to jeopardize the existence of any proposed endangered or threatened species or likely to result in the destruction of critical habitats. *See* 47 C.F.R. § 1.1307. The FCC requires any facility that is sited in any of the above noted areas to submit an environmental assessment. *Id.* The environmental assessment "shall deal specifically with any feature of the site which has special environmental significance (e.g., wilderness areas, wildlife preserves, natural migration paths for birds and other wildlife, and sites of historic, architectural, or archeological value)." 47 C.F .R. § 1.1311(b).

Additionally, any suggestion that the court should interpret the meaning of "environmental effects" in a manner that circumscribes the FCC's preemptive authority under section 332(c)(7)(B)(iv) is arguably an attempt usurp the FCC's authority to regulate RF emissions, a task Congress has delegated to the FCC. Because Congress has granted the FCC authority to regulate RF emissions from cellular towers, where a party's true claim is against the FCC and its policies concerning RF emissions, as it is in the instant matter, the proper procedure is to petition the FCC. *See* 47 C.F.R. § 1.1307(c) ("If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in

detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process."). If an aggrieved party takes issue with the FCC order, the proper appellate forum is the Court of Appeals. *See* 47 U.S.C. § 402 ("[a]ny proceeding to enjoin, set aside, annul or suspend any order of the [FCC] . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28"); 28 U.S.C. § 2342 ("the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the [FCC]. . . .").

Jaeger's interpretation of "environmental effects" as limited only to humans would result in an application of section 332(c)(7)(B)(iv) that is clearly at odds with Congressional intent and FCC policy on RF emissions. The plain meaning of the term "environmental effects" incorporates adverse effects on all biological organisms. Accordingly, the Council is preempted, under the TCA, from rendering a siting decision on the basis of the health effects of RF emissions on widlife, including migratory birds and bald eagles.

5. *The MBTA and BGEPA*

In addition to her claims under the TCA, Jaeger argues, in her first two claims for relief, that the construction of the cellular tower will result in impermissible harm to migratory birds and bald eagles in violation of the MBTA and the BGEPA. The statutes that implement the MBTA and the BGEPA are criminal statutes setting forth a scheme of strict liability for parties responsible for the death of protected birds. *See United States v.*

FMC Corporation, 572 F .2d 902, 907-08 (2d Cir.1978); *Defenders of Wildlife v. Administrator EPA*, 882 F.2d 1294, 1301-02 (8th Cir.1989). *See also* 16 U.S.C. §§ 703-712 and 668 (criminalizing the killing, taking, capturing or selling of migratory birds and eagles respectively).

Private plaintiffs may, via the Administrative Procedure Act ("APA"), pursue claims against federal agencies for failure to adhere to the MBTA and BGEPA. *See* 5 U.S.C. § 701; *see also Fund for Animals v. Norton*, 374 F.Supp.2d 91, 98 (D.C.Cir.2001); *Hill v. Norton*, 275 F.3d 98, 103 (D.C.Cir.2001); *Humane Society of the United States v. Glickman*, 217 F.3d 882 (D.C.Cir.2000). A private plaintiff, however, may not sue state or municipal agencies under the APA. *See* 5 U.S.C. § 701(b)(1) (" 'agency' means each authority of the Government of the United States"); *see also Hunter v. Underwood*, 362 F.3d 468, 477 (8th Cir.2004); *Western State University of California v. American Bar Ass'n.*, 301 F.Supp.2d 1129, 1133 (C.D.Cal.2004). Because Jaeger lacks standing to enforce violations of the MBTA and BGEPA claims against a state entity and private company, her claims pursuant to those statutes must fail.

C. Public Need

In her fifth claim for relief, Jaeger alleges that the Council failed in its March 12, 2009 Decision and Order to make a finding that Cellco's tower filled a public need within the criteria set forth by the Second Circuit in *Sprint Spectrum v. Willoth*, 176 F .3d 630 (2d Cir.1999). Defendants maintain that there is no requirement that the Council make a finding of public need under the holding of

Willoth nor under the terms of the TCA. Defendants argue that *Willoth* does not stand for the proposition that the TCA affirmatively requires a wireless service provider to show that the geographic area is inadequately served in order for the regulatory body to grant an application. I agree with the defendants.

In *Willoth,* Sprint proposed to construct three cell towers at sites in the town of Ontario, NY. The town denied the application and Sprint appealed, alleging that the town did not provide a good basis for the denial. Sprint claimed an entitlement under the TCA to construct as many towers as it deemed necessary for competitive business. The Court flatly rejected that argument, and confirmed the authority of the town to reject cellular tower applications under the TCA. The *Willoth* Court held that nothing in the TCA indicates that local and state governments cannot consider the quality of existing services, the number of existing towers and less intrusive means of providing wireless coverage. Under *Willoth,* local governing bodies can deny applications for cellular towers for a variety of reasons under 47 U.S.C. § 332(c)(7), so long as the denial does not violate the prohibition on regulating RF emissions. The holding in *Willoth,* however, does not dictate that the Council must find a public need in approving an application.

Jaeger argues in her opposition papers that "[o]nce an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader. State and local governments may deny subsequent applications without

thereby violating subsection B(i)(II) of the TCA."[4] (Doc. 20 at 29). The 3rd Circuit, she maintains, articulated in *APT Pittsburgh LTD Partnership v. Penn Township*, 196 F.3d 469 (3d Cir.1999), that *Willoth* requires a cell tower applicant to show that the manner in which it proposes to fill a service gap is the least intrusive. The *APT* Court actually held that, in order for the wireless provider to show a *denial* violated section 332, the provider must demonstrate a significant gap in service in a particular area and that the manner in which it proposes to fill the significant gap in service is the least intrusive. Nothing in *Willoth* nor *APT* requires local and state governments to articulate a finding of a public need in *approving* cell tower applications. Jaeger, therefore, cannot sustain a claim under *Willoth* that the Council failed either to articulate a finding of public need or to find that Cellco's proposed tower is the least intrusive option to provide wireless services in that area.

D. Due Process

Jaeger's sixth claim for relief alleges that Conn. Gen.Stat. § 16-50v, which sets forth the funding scheme of the Council, is unconstitutional and impairs her due process rights to have her

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[4] Section 332(c)(7)(B) Limitations:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-...

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

grievances impartially heard. Jaeger maintains that the funding mechanism of the Council creates a conflict of interest in that the Council has a financial motivation to approve personal wireless facilities. The more facilities the Council approves, she argues, the more it can increase its budget. Thus, according to Jaeger, the Council has no incentive to treat an intervenor with equal consideration. Because the Council's funding mechanism inclines it to rule in favor of the industry participants who fund the Council, Jaeger argues she was deprived of a fair opportunity to be heard by the Council.

Defendants characterize the funding scheme as the collection of user fees, arguing that user fees may reasonably support the budget of a governmental unit that operates facilities that bear at least a "functional relationship" to facilities used by the fee payers.[5] It may be that the fees and assessments collected by the Council are merely user fees. Jaeger is not challenging the constitutionality of charging user fees; she challenges the Council's collection of its sole source of revenue directly from the entities it is charged with regulating. The constitutionality of the Council's funding mechanism appears to be a matter of first impression and the issue turns, not on the constitutionality of user fees, but on whether the funding scheme creates a direct conflict of interest that denied Jaeger due process.

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[5] *See Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79, 87 (2d Cir.2009); *see also Automobile Club of New York, Inc. v. Port Authority*, 887 F.2d 417, 421 (2d Cir.1989).

Jaeger's attack on section 16-50v appears to be a facial challenge to the constitutionality of the statute. A plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Courts are instructed that, "in determining whether a law is facially invalid, [they] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases ." *See Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190 (2008), citing *United States v. Raines*, 362 U.S. 17, 22 (1960).

Under the statutory framework, the Council generates an anticipated budget, the budget is reviewed by the General Assembly, and once approved, the Council covers its anticipated expenses by apportioning application fees and assessments among existing and proposed communications providers. The fees charged are considered recovered administrative expenses. *See* Conn. Gen.Stat. § 16-50v. In section 16-50v(c), the statute requires the Council to refund any payments received from a provider in excess of expenses attributed to it. Section 16-50v(b)(1) caps the collected assessments at $1.5 million. *See also* Op. Att'y Gen. No.2006-009a (2006), 2006 WL 1280872 (concerning the Council's annual cap on assessments).[6]

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[6] At the time the Attorney General issued that opinion, the annual cap on assessments was set at one million dollars. On July 6, 2007 the Connecticut Legislature increased the annual cap on assessments to one million five

Section 16-50v makes clear that all of the Council's revenues are derived solely from cellular tower owners and service providers. Indeed, the owner/provider-paid expenses are the sole source of funds for the salaries of the Council members and its executive director. The members are paid a per diem of $150 for attending meetings, up to a maximum of $12,000 per year.[7] The Council's website states that it does not receive funding from the state's general fund; in other words, the Council does not receive taxpayer dollars to fund its operation. *See* Connecticut Siting Council-About Us, http:// www.ct.gov/csc/cwp/view.asp?a=895 & q=248310 (last visited March 11, 2010). There are a multitude of personal wireless service owners. *See* Telecommunications Database-Comprehensive List of Sites, *available at* http:// www.ct .gov/csc/cwp/view.asp?a=895 & Q=248312 & csc-Nav= § (last visited March 11, 2010) The types of tower owners cover the spectrum of established telecommunications companies, municipalities, energy companies, privately owned businesses, non-profits, churches and citizen homeowners. *Id.* Cellco itself owns or shares ownership of at least eleven personal wireless facilities. *Id.* Verizon itself owns or shares ownership of an additional 34 personal wireless facilities. *Id.*

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hundred thousand dollars. 2007 Conn. Legis. Serv. P.A. 07-222, §§ 5 to 7, eff. July 6, 2007.

[7] The statute does not set forth the income of the members and the court could not find support for these numbers on the Council's website. In any event, these facts, which are set forth in Jaeger's complaint, are accepted as true for the purposes of this ruling.

Jaeger's attack on the constitutionality of section 16-50v has surface appeal. Arguably, the owner/provider funding of the Council represents a conflict of interest that places an intervenor like Jaeger, who opposes tower construction, at a distinct disadvantage. Under the due process clauses of the Fifth and Fourteenth Amendments, parties and the public are entitled to tribunals free of personal bias; this requirement is applicable to administrative agencies in much the same way as it is applicable to courts. *See MFS Securities Corp. v. S.E.C.*, 380 F.3d 611, 617 (2d Cir.2004). Here, the Council acts as an adjudicator on siting issues and as the agency standing between the communications industry and private citizens with adverse interests. The Council is obligated to decide applications in a neutral manner. Due process demands strict impartiality on the part of those who function in judicial or quasi-judicial capacity. Administrators serving as adjudicators are presumed to be unbiased, but that presumption can be rebutted by showing of disqualifying interest, either pecuniary or institutional, and the burden of establishing disqualifying interest rests on the party making that assertion. *See Wolkenstein v. Reville*, 694 F.3d 35, 41-42 (2d Cir.1982).

Jaeger's participation as an intervenor before the Council does not mean she necessarily received a "fair hearing." *See Wojchowski v. Daines*, 498 F.3d 99, 102-03 (2d Cir.2007) (holding that the term "fair hearing" is a term of art used to describe a judicial or administrative hearing conducted in accordance with due process, but simply because a statute or regulation sets forth a series of procedures that it deems a fair hearing

does not guarantee that due process is met.). There is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). A due process violation may, however, be established without a showing of actual bias where "a court . . . determin[es] from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." *Id.* at 58; *see also Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164, 167 (2d Cir .1992).

The potential conflict of interest built into the Council's funding mechanism raises serious concerns, especially with respect to the Council's role as adjudicator. The funneling of funds directly from industry-parties to the purse of the Council can undercut the necessary impartiality that due process dictates. Indeed, neighboring New England states have promulgated similar regulatory authorities but have developed funding mechanisms without such apparent conflicts of interest. For instance, the state of Massachusetts has a three-member Commonwealth Utilities Commission. The three members are salaried employees. *See* M.G.L.A. 25 § 2. The Commission has authority to levy assessments against industry participants, but the assessments are paid into the state's General Fund. Additional assessments may be levied to recover indirect operating expenses of the Commission but the monies are collected by the Department of Public Utilities. *See* M.G.L.A. 25 § 18. Rhode Island's energy facility siting board consists of the chairperson of the public utilities commission, the director of the department of environmental managements, and the associate

director of administration for planning. The board members serve without compensation and are reimbursed only for expenses incurred in performance of their actual duties. *See* RI Stat. § 42-98-5(c). The board has access to $100,000 in funds to offset the costs of hiring expert witnesses, legal counsel and the like, in the performance of its duties. The board can set reasonable fees collected from applicants to offset the cost of administration. The fees are paid to the general treasury. *See* RI Stat. § 42-98-17. In both of these examples, the decisionmaker does not have a personal financial interest in the number of applications filed nor in ensuring that wireless facilities are approved and become fee-payers.

For the reasons set forth above, I have reservations about the constitutionality of section 16-50v. The Supreme Court has cautioned, however, that courts should exercise judicial restraint and refrain from premature interpretations of statutes. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). Courts should not "anticipate a question of constitutional law in advance of the necessity of deciding. . . ." *Id.* I do not reach the merits of Jaeger's claim concerning section 16-50v because it is unnecessary to do so. Here, at the core of Jaeger's due process claim is an allegation that the Council failed to give proper weight to her arguments concerning RF emissions. Regardless of any conflict of interest the funding mechanism of section 16-50v creates, the Council could not have rendered a siting decision on the basis of RF emissions as proposed by Jaeger. Because the relief that Jaeger seeks and the basis for that relief is

barred by the TCA, she fails to demonstrate that under the circumstances of this case she presents a due process claim on which relief can be granted. If I held that section 16-50v violates due process rights of intervenors such as Jaeger, the most Jaeger could accomplish is a remand to a panel unaffected by conflict for reconsideration of her arguments. Such a remand would be futile, because the relief Jaeger seeks is barred under the TCA. Accordingly, Jaeger's sixth claim for relief is dismissed.

IV. *Conclusion*

For the foregoing reasons, defendants' motions to dismiss (docs.16, 23) are granted. Plaintiff's cross-motion for summary judgment (doc. # 25) is denied as moot.

It is so ordered.

Court of Appeals Order on Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number: 10-1347
Decided February 1, 2011

DINA JAEGER,

Plaintiff-Appellant,

—v.—

CELLCO PARTNERSHIP, dba VERIZON WIRELESS, CONNECTICUT SITING COUNCIL,

Defendants-Appellees.

For Dina Jaeger, Plaintiff-Appellant: Whitney North Seymour, Jr., Attorney, Law Office of Whitney North Seymour, Jr., New York, NY; Gabriel North Seymour, Attorney, Gabriel North Seymour PC, Falls Village, CT.

For Cellco Partnership, dba Verizon Wireless, Defendant-Appellee: Bradford Sargent Babbitt, Attorney, Robinson & Cole LLP, Hartford, CT; Andrew Gerald McBride, Esq., Joshua Turner, Wiley Rein LLP, Washington, DC.

For Connecticut Siting Council, Defendant-Appellee: Robert Louis Marconi, Assistant Attorney General, Office of the Attorney General, New Britain, CT.

Before: Amalya L. Kearse, John M. Walker, Rosemary S. Pooler, Circuit Judges.

ORDER

Dina Jaeger having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

Constitutional Provisions and Statutes Involved in the Case

Relevant Constitutional Provisions

Article I, Section 8, Clause 3 (Commerce Clause) [in pertinent part]

> Section 8.
>
> The Congress shall have power * * *
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Article III, Sections 1 and 2 [in pertinent part]

> Section 1.
>
> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *
>
> Section 2.
>
> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * *

Article VI (Supremacy Clause) [in pertinent part]

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
> * * *

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant Statutes

16 U.S.C. §§668-668d (Bald and Golden Eagle Protection Act) [Relevant Provisions]

§ 668. Bald and golden eagles

(a) Prohibited acts; criminal penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: Provided, That in the

case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $10,000 or imprisoned not more than two years, or both: Provided further, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: Provided further, That one-half of any such fine, but not to exceed $2,500, shall be paid to the person or persons giving information which leads to conviction: Provided further, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

(b) Civil penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, may be assessed a civil penalty by the Secretary of not more than $5,000 for each

such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary. For good cause shown, the Secretary may remit or mitigate any such penalty. Upon any failure to pay the penalty assessed under this section, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In hearing any such action, the court must sustain the Secretary's action if supported by substantial evidence.

16 U.S.C. §§703-712 (Migratory Bird Treaty Act) [Relevant Provisions]

§ 703. Taking, killing, or possessing migratory birds unlawful

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export,

any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

§ 704. Determination as to when and how migratory birds may be taken, killed, or possessed

(a) Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or

egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President. * * *

§ 707. Violations and penalties; forfeitures

(a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $15,000 or be imprisoned not more than six months, or both. * * *

§ 708. State or Territorial laws or regulations

Nothing in this subchapter shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of this subchapter, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with section 704 of this title. * * *

§ 712. Treaty and convention implementing regulations; seasonal taking of migratory birds for essential needs of indigenous Alaskans to preserve and maintain stocks of the birds; protection and conservation of the birds

* * * (2) The Secretary of the Interior is authorized to issue such regulations as may be necessary to implement the provisions of the convention between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, the convention between the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the convention between the United States and the Government of Japan for the protection of migratory birds in danger of extinction, and their environment concluded March 4, 1972, and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environment concluded November 19, 1976.

Telecommunications Act
(Relevant Provisions)

47 U.S.C. §332(c)(7)(A) & (B)(v)

§ 332. Mobile services

(c) Regulatory treatment of mobile services

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the

authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the

placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Connecticut General Statutes
(Relevant Provisions)

Conn. Gen. Stat. §16-50g.

Sec. 16-50g. Legislative finding and purpose.

The legislature finds that power generating plants and transmission lines for electricity and fuels, community antenna television towers and telecommunication towers have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and

towers, if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, scenic, historic and recreational values of the state. The purposes of this chapter are: To provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria, and technically sufficient to assure the welfare and protection of the people of the state; to encourage research to develop new and improved methods of generating, storing and transmitting electricity and fuel and of transmitting and receiving television and telecommunications with minimal damage to the environment and other values described above; to promote energy security; to promote the sharing of towers for fair consideration wherever technically, legally, environmentally and economically feasible to avoid the unnecessary proliferation of towers in the state particularly where installation of such towers would adversely impact class I and II watershed lands, and aquifers; to require annual forecasts of the demand for electric power, together with identification and advance planning of the facilities needed to supply that demand and to facilitate local, regional, state-wide and interstate planning to implement the foregoing purposes.

Conn. Gen. Stat. § 16-50p.

Sec. 16-50p. Certification proceeding decisions: Timing, opinion, factors considered. Telecommunications and community antenna television facilities: Additional factors considered, conditions. Modification of location. Amendment proceeding decisions. Service and notice. "Public need" defined.

(a)(1) In a certification proceeding, the council shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate.

(b)(1) Prior to granting an applicant's certificate for a facility described in subdivision (5) or (6) of section 16-50i, the council shall examine, in addition to its consideration of subdivisions (1) to (5), inclusive, of subsection (a) of this section: (A) The feasibility of requiring an applicant to share an existing facility, as defined in subsection (b) of section 16-50aa, within a technically derived search area of the site of the proposed facility, provided such shared use is technically, legally, environmentally and economically feasible and meets public safety concerns, (B) whether such facility, if constructed, may be shared with any public or private entity which provides telecommunications or community antenna television service to the public, provided such shared use is technically, legally, environmentally and economically feasible at fair market rates, meets public safety concerns, and the parties' interests have

been considered and (C) whether the proposed facility would be located in an area of the state which the council, in consultation with the Department of Environmental Protection and any affected municipalities, finds to be a relatively undisturbed area that possesses scenic quality of local, regional or state-wide significance. The council may deny an application for a certificate if it determines that (i) shared use under the provisions of subparagraph (A) of this subdivision is feasible, (ii) the applicant would not cooperate relative to the future shared use of the proposed facility, or (iii) the proposed facility would substantially affect the scenic quality of its location and no public safety concerns require that the proposed facility be constructed in such a location.

District Court's Complaint (without exhibits)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT (HARTFORD)

COMPLAINT

(Hearing and Decision to be Expedited
Pursuant to 47 U.S.C. § 332(c)(7)(B)(v))

Civil Action No. 3:09CV567 (SRU)

April 8, 2009

DINA JAEGER,

Plaintiff,

—v.—

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, and THE CONNECTICUT SITING COUNCIL,

Defendants.

PRELIMINARY STATEMENT

Nature of the Action

1. This is an action to void and enjoin the decision and order of the CONNECTICUT SITING COUNCIL of March 12, 2009 (CSC Docket No. 360) granting a Certificate of Environmental Compatibility and Public Need for the Construction,

Maintenance and Operation of a personal wireless service telecommunications facility at 188 Route 7 South, Falls Village (Canaan), Connecticut to Defendant Cellco Partnership d/b/a Verizon. The action also seeks declaratory judgment and related relief. The action is brought pursuant to (a) the International Migratory Bird Treaty, the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act and the Supremacy Clause of Article VI of the U.S. Constitution; (b) 28 USC § 2201 (for declaratory judgment); (c) 47 USC § 332 (c)(7)(B)(v) of the Telecommunications Act; and (d) the Fourteenth Amendment (and related provisions) of the Constitution of the United States.

2. The grounds for this action are:

(a.) The authorized placement and operation of the proposed wireless telecommunications facility ("cell tower") at the designated location will result in violations of the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act;

(b.) Approval of the tower application by the Defendant CONNECTICUT SITING COUNCIL violated its statutory duty to safeguard the health and safety of Plaintiff JAEGER and her children (along with other Falls Village schoolchildren and nearby residents) against potentially harmful non-thermal biological effects of radiofrequency emissions;

(c.) CELLCO failed to establish a public need for the proposed facility under the Telecommunications Act;

(d.) Defendant COUNCIL'S denials of citizen requests to relocate, modify or deny the placement and construction of the CELLCO personal wireless service facility (including Town Zoning regulations "Telecommunications Tower Guidelines"), without providing any written support for such decision by substantial evidence contained in a written record, violated 47 U.S.C. 332(7)(B)(iii); and

(e.) Payment of compensation to members and staff of the CONNECTICUT SITING COUNCIL out of funds supplied solely by the industry which the COUNCIL regulates violates due process requirements by compromising and impairing the COUNCIL's impartiality, and deprives Plaintiff JAEGER, her children, and other affected local residents and children of their constitutional rights to redress of grievances, due process protection against searches and seizure, equal protection of the law, and to be safe in their homes, along with their rights reserved under the Tenth Amendment to protection of their health, safety and welfare by local democratically-elected town officials.

3. The Telecommunications Act directs that proceedings under 47 U.S.C. § 332(c)(7)(B)(v) be heard and decided by the Court "on an expedited basis."

JURISDICTION AND VENUE

4. The Court has jurisdiction to hear and decide this action under 28 U.S.C. §§ 1331 and 2201, as well as under 47 U.S.C. § 332(c)(7)(B)(v).

5. On March 12, 2009, the CONNECTICUT SITING COUNCIL (CSC) filed its final decision and order approving the application of CELLCO PARTNERSHIP under CSC Docket Number 360 for the Certificate of Environmental Compatibility and Public Need for the construction, maintenance and operation of a telecommunications facility located at 188 Route 7 South, Falls Village (Canaan), Connecticut. That decision is the subject of this proceeding. This litigation was commenced within 30 days of the COUNCIL's final action. A copy of the COUNCIL's decision and order, conclusions of law, findings of fact and opinion are attached hereto as Exhibit A.

6. Plaintiff DINA JAEGER was granted Intervenor status by the CONNECTICUT SITING COUNCIL in the CELLCO certification proceeding and actively participated therein, including providing testimony and numerous exhibits. She has standing to bring this action as an Intervenor in the underlying proceeding, as a person directly and adversely affected by the CONNECTICUT SITING COUNCIL's final action, and as a resident, taxpayer and voter of Falls Village injured by the COUNCIL's action.

7. All parties reside in or are found in this District, and all events referred to in this action occurred here. Venue properly lies in this District.

8. The stated purpose of the CELLCO Route 7 Falls Village facility is to provide wireless service along Route 7 and portions of Route 112 and Route 126 as well as local roads in the southern portion of the Town of Canaan (Falls Village). In approving CELLCO's application, the COUNCIL

simultaneously authorized, with no evidentiary support of any kind, the future addition of 700 MHz transmissions, collocation by four additional telecommunications wireless carriers, and preliminary approval for the placement of an additional tower to the north along Route 7.

9. Plaintiff intends to file an administrative appeal in the Connecticut Superior Court under applicable Connecticut State administrative and substantive law challenging the arbitrary and capricious administrative actions, abuses of discretion, and errors of law by the CONNECTICUT SITING COUNCIL in Docket 360.

APPLICABLE CONSTITUTIONAL PROVISIONS

10. The following provisions of the United States Constitution are applicable to this case:

Article VI (in pertinent part):

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PARTIES

11. Plaintiff DINA JAEGER is the mother of two minor children, and lives at 167 Beebe Hill Road, Falls Village, Connecticut. Her home is located 1,290 feet in a straight line (c. 400 meters) from the proposed CELLCO cell tower. She is also co-owner of undeveloped property located directly across Route 7 from the cell tower site. The market value of both properties will be adversely affected by the construction and operation of the cell tower. Plaintiff JAEGER is an active recreational birdwatcher. She draws spiritual inspiration and religious guidance from sightings of eagles and other wildlife.

12. Defendant CELLCO PARTNERSHIP d/b/a Verizon Wireless is a Delaware Partnership with an administrative office at 99 East River Drive, East Hartford, Connecticut. The FCC has licensed CELLCO to operate a wireless communications system in the State of Connecticut. On May 30, 2008, CELLCO (VERIZON) acquired the Alltel Communication's cellular license for Litchfield County, Connecticut. Verizon has also acquired a license to provide service in the 700 MHz frequency band to

be used to provide fourth generation (4G) wireless service and was authorized by the COUNCIL's decision of March 12, 2009, to provide such service with no showing of its potential environmental impact.

13. Defendant CONNECTICUT SITING COUNCIL has exclusive statutory jurisdiction to determine the placement of wireless telecommunications facilities throughout the State of Connecticut under Connecticut General Statutes 16-50g, supplanting the jurisdiction of local zoning bodies. The Defendant COUNCIL held a public hearing on Docket 360 at the Lee H. Kellogg elementary school in Falls Village on July 1, 2008. The public hearing was continued on July 31, 2008 at the COUNCIL's office in New Britain, Connecticut. Final decision was rendered on March 12, 2009.

FIRST CLAIM FOR RELIEF

(Violation of the Migratory Bird Treaty and Act and 47 U.S.C. § 332(7)(B)(iii))

14. Article VI of the U.S. Constitution (Supremacy Clause) mandates that all treaties are the Supreme law of the land—which includes treaties protecting migratory birds.

15. The Migratory Bird Treaty Act of 1918 U.S.C Title 16, Chapter 7, Subchapter II, section 703 provides:

> [I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to

barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

16. Under the Supreme Court holding in *State of Missouri v. Holland,* [252 U.S. 416, 433 (1920)] and the express savings clause of the Telecommunications Act of 1996, federal and international law protecting migratory birds supersede conflicting provisions of the Telecommunications Act.

17. Undisputed evidence was introduced at the COUNCIL's hearing that close to 200 protected

species of migratory birds, as well as bald and golden eagles, have been observed within the proposed CELLCO coverage area, including on and near Plaintiff's property, indicating that the cell tower is located at the heart of a migratory bird flyway. Based on the scientific evidence in the Council hearing record, the operation of the CELLCO cell tower at the proposed Falls Village location would violate the International Migratory Bird Treaty and the Migratory Bird Treaty Act by:

(a) taking, capturing and killing migratory birds by interfering with the birds' natural navigation system, causing tower strikes and fatalities;

(b) taking, capturing and killing migratory bird eggs and bird reproductive organs through continuous RF radiation in the cell tower vicinity; and

(c) taking, capturing and killing migratory bird habitats, nests and food sources in the cell tower's coverage area.

18. Plaintiff JAEGER presented substantial evidence before the COUNCIL of major harm done to the navigation, reproduction and well-being of nesting birds in habitats close to cell towers (e.g. Exhibit IJ 6, *Balmori Study of White Storks*, 2005; IJ 5, *Study on House Sparrows*, 2007.). The scientific explanation for that evidence is stated in the record as follows:

> Animals are very sensitive electrochemical complexes that communicate with their environment through electrical impulses. Ionic currents and electric potential differences exist through the cellular membranes and cor-

poral fluids. The intrinsic electromagnetic fields from the biological structures are characterized by certain specific frequencies that can be interfered with by the electromagnetic radiation, through induction and causing modification in their biological responses. . . . The low intensity pulsed microwave radiation from cellsites produces subtle athermal influences in the living organisms. . . Some effects are manifested exclusively with a certain power density, while others are manifested after a certain duration of the irradiation, which indicates long-term cumulative effects. . . . Research has shown such effects on the living organisms at molecular and cellular levels on immune processes, in DNA, on the nervous, cardiac, endocrine, immune and reproductive systems, modification of sleep and alteration of the cerebral electric response, increase of the arterial pressure and changes in the heart rhythm, and an increase in the permeability of the blood brain barrier.

(Exhibit IJ 6, page 110)
(Footnotes Omitted.)

19. The following scientific studies submitted by Plaintiff JAEGER show that the operation of cell transmission antennas is likely to:

(a) interfere with migratory birds' natural navigation systems, causing tower strikes and fatalities after dark (IJ1, IJ2, IJ3);

(b) prevent migratory bird nesting and reproduction within 200 meters of cell towers (IJ4, IJ5, IJ6); and

(c) cause infertility in small animal food sources in migratory bird habitats (IJ7).

20. Defendant COUNCIL arbitrarily and capriciously misinterpreted and misconstrued the relevancy of these studies (see CSC Finding 74), abused its discretion, and erred as a matter of law in rejecting these studies, as well as the U.S. Fish and Wildlife guidance recommendations for siting and operation of cell towers in migratory bird areas (see CSC Finding 65, esp. USFWS recommendations 3, 4, 6 and 9; also Finding 66).

21. At the COUNCIL's invitation, Intervenor JAEGER submitted proposed Findings of Fact dated September 2, 2009, which included the following:

> 19. Scientific studies offered in evidence by Intervenor show that the operation of cell transmission antennas can: (a) interfere with migratory birds' natural navigation systems causing tower strikes and fatalities after dark (IJ1, IJ2, IJ3); (b) prevent migratory bird nesting and reproduction within 200 meters of cell towers (IJ4, IJ5, IJ6); and (c) cause infertility in small animal food sources in migratory bird habitats (IJ7).

This finding was rejected and denied by the COUNCIL without any support by substantial evidence in the written record.

22. Plaintiff introduced eye-witness affidavits of migratory bird sightings on and over her property. A number of local citizens confirmed similar sightings of birds and wildlife during the COUNCIL's Public Hearing at the town elementary school on

July 1, 2008. At the same hearing, a petition signed by local residents urged the COUNCIL not to approve the proposed tower (Ex. IJ48).

23. On September 2, 2009 Intervenor JAEGER filed the following proposed Findings of Fact at the COUNCIL's invitation:

> 2. Applicant has not demonstrated that there are no alternative sites available that would be less intrusive or less harmful to the environment.
>
> 3. Applicant has not demonstrated why co-locating or roaming arrangements are not feasible with one of the four existing providers who presently serve this area.

24. All of the requests based on substantial evidence showing the need for relocation, modification and denial of the CELLCO personal wireless service facilities were rejected and denied by the COUNCIL in its written decision without any support by substantial evidence in a written record. The collective requests by Intervenor JAEGER and fellow town residents to the CONNECTICUT SITING COUNCIL to place CELLCO's personal wireless service facilities at a different and safer location in order to protect the schoolchildren, nearby residents, migratory birds, eagles and other threatened species were denied by the COUNCIL with no adequate explanation in writing supported by substantial evidence, in violation of subparagraph (7)(B)(iii).

25. 47 U.S.C. § 332(c)(7)(B)(iii) provides:

> (iii) Any decision by a State or local government or instrumentality thereof to deny a

> request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

The COUNCIL's Decision in Docket 360 directly and indirectly violates this statute.

26. The enactment of the Telecommunications Act of 1996 did nothing to impair the effectiveness of the MBTA or the Bald and Golden Eagle Protection Act. House Report No. 104-204 specifically assured the Congress and the American people that the savings clause in the TCA guaranteed that existing Federal law would not be affected by the provisions of the TCA except as specifically stated in the language of the law. "Subsection (c) provides that nothing in the Act shall be construed to modify, impair, or supersede any other Federal law other than law expressly referred to in this Act." (House Report No. 104-204 at p. 124)

27. The Federal Communication Commission's (FCC) safety regulations relating to power levels for RF emissions do not apply to birds, animals, plants or wildlife. They are specifically limited to *human health*. (See description of the FCC regulations on the FCC's own website, headed "RF SAFETY PROGRAM" and found at http://www.fcc.gov/oet/rfsafety/rf-faqs.html#Q10.) The FCC states that its RF emissions rules "are designed to protect public health" and to constitute "limits for human exposure to RF emissions."

28. The COUNCIL's Decision of March 12, 2009, violates the MBTA in its Conclusions of Law numbered 4 and 5 without any support by substantial

evidence in direct violation of 47 U.S.C. § 332(7)(B)(iii).

SECOND CLAIM FOR RELIEF

(Violation of the Bald and Golden Eagle Protection Act and 47 U.S.C. § 332(7)(B)(iii))

29. Plaintiff repeats and realleges paragraphs 1 through 28 *supra*.

30. The Bald and Golden Eagle Protection Act (16 U.S.C. Section 668) provides:

> § 668. Bald and golden eagles
>
> **(a) Prohibited acts; criminal penalties**
>
> Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or *with wanton disregard for the consequences of his act take, possess,* sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, *at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles*, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: Provided, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $10,000 or imprisoned not more than two years, or both: Provided further,

> That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: * * *
>
> (Emphasis added.)

31. The scientific evidence presented by Plaintiff JAEGER shows that the operation of the CELLCO cell tower at the proposed Falls Village location would violate the Bald and Golden Eagle Protection Act in the same manner as described in paragraphs 17 to 19 above.

THIRD CLAIM FOR RELIEF

(Declaratory Judgment that TCA does not prevent state and local government from placing cell towers a safe distance away from institutions, homes and schools)

32. Plaintiff repeats and realleges paragraphs 1 through 31 *supra*.

33. 47 U.S.C. § 332(c)(7)(A) provides as follows:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

34. The Town of Canaan's Inland Wetlands/Conservation Commission submitted a report to the COUNCIL expressing the Commission's concerns "regarding the possibility of attendees and staff of the school being exposed to 'low intensity, ultra-

high frequency radiation." During the public hearing before the Council local citizens also expressed concerns about possible health effects on young schoolchildren. The COUNCIL disregarded all of these concerns in its Decision. (See Conclusions of Law No. 3)

35. During the proceedings before the CONNECTICUT SITING COUNCIL, Plaintiff JAEGER, as Intervenor, introduced substantial scientific evidence showing the harmful human health effects of wireless transmissions on persons living near cell towers. This evidence included the following:

> A 2005 scientific study in Austria of a random cross-section of inhabitants living near cell towers ("base stations") showed that people living for more than one year near the towers experienced headaches, vertigo, palpitations, tremors, hot flashes, sweating, loss of appetite, loss of energy, exhaustion, tiredness, difficulties in concentration, and stress. (IJ34)
>
> A 2003 scientific study in France of a random cross-section of inhabitants living near cell towers ("base stations") showed that persons living close to cell towers experienced nausea, loss of appetite, visual disturbances and difficulty in moving. Those living within 100 meters of base stations experienced irritability, depressive tendencies, difficulties in concentration, loss of memory, dizziness, and lowering of libido. For persons living in the zone of 100 to 200 meters from base stations, the symptoms experienced included headaches, sleep disruption, feelings of discomfort and skin problems. Beyond 200

meters, the principle symptom was fatigue. (IJ35)

In 2005 a group of doctors in Bavaria, Germany, reported observations of patients living in the vicinity of cell towers ("base stations") experienced the following symptoms: sleep disturbance, tiredness, headache, restlessness, lethargy, irritability, inability to concentrate, forgetfulness, depression, impaired hearing, dizziness, nose bleeds, visual disturbances, joint and muscle pains, palpitations, increased blood pressure, hormone disturbances, nocturnal sweating and nausea. (IJ36)

In 2003, in a double-blind study conducted in the Netherlands of subjective complaints of persons exposed to wireless signals found a statistically significant relation between exposure to wireless signal and cognitive impairment including anxiety, inadequacy, reaction time, visual selection. (IJ37)

In 2003, a scientific study in Spain of persons exposed to wireless signals for more than six hours a day, seven days a week, at power levels far below safety guidelines, experienced symptoms such as fatigue, irritability, headache, nausea, appetite loss, discomfort, gait difficulty, sleep disturbance, depression, difficulty in concentration, memory loss, dizziness, skin alterations, visual dysfunction, auditory dysfunction and cardiovascular alterations. (IJ38)

In 2004, a scientific study in Sweden concluded that there was an increase in malig-

nant melanomas of the skin related to pulsed signals from FM broadcasting antennas in Sweden, Norway and Denmark attributed to impairment of the skin repair mechanism by electronic radiation. (IJ39)

In 2000, as a result of scientific studies in the United Kingdom, the UK Department of Health recommended a "precautionary approach" to the placement of base stations "until more research findings become available." (IJ40)

In 2004, the International Association of Firefighters (IAFF) reported that some firefighters with cell towers currently located on their fire stations are experiencing symptoms that "put our first responders at risk." The IAFF specifically referred to headaches, slow response and clouded ability to make decisions caused by "a sort of brain fog" they attributed to the presence of these cell towers. At their 2004 annual convention, the IAFF members passed a resolution to study the health effects of cell towers located on fire stations and urged a moratorium on the placement of new cell towers on fire stations until the completion of the study. (IJ41)

In 2006, a group of scientists meeting at Benevento, Italy adopted a resolution urging a "precautionary approach" to the exposure of people to EMF and RF radiation. The resolution specifically stated: "Based on our review of the science, biological effects can occur from exposures to both extremely low frequency fields (ELF EMF) and radiation frequency

fields (RF EMF)." The scientists added that "epidemiological and laboratory studies that show increased risks for cancers and other diseases from occupational exposures to EMF cannot be ignored." (IJ43)

In 2007, *The Sunday Times* in the United Kingdom reported that study of sites around mobile phone masts show "high incidences of cancer, brain haemorrhages, and high blood pressure within a radius of 400 yards of mobile phone masts." The news report stated "a quarter of the 30 staff at a special school within sight of the 90 ft high mast have developed tumors since 2000, while another quarter have suffered significant health problems." (IJ44)

The EMR Policy Institute filed a statement by in this proceeding under date of August 25, 2008 attaches a report on a study conducted at the request of the Federal Agency for radiation protection in Germany based on data of approximately 1,000 patients showing that the proportion of newly developing cancer cases was significantly higher among those patients who had lived during the past ten years at a distance of up to 400 metres from a cellular transmitter site, compared to patients living further away. The patients living within 400 metres of the transmitter tended to develop cancers at a younger age, and the risk of developing cancer for those living within 400 metres of the cell tower was three times higher than the rate of developing cancer for

those living at a greater distance. (Ex. E to EMRPI August 25, 2008 statement.)

36. Plaintiff asks the Court to enter judgment finding and declaring that under 47 U.S.C. § 332(c)(7)(B)(iv)[1], in making decisions regarding the placement of personal wireless service facilities, States and local governments in the performance of their police power responsibilities to protect the health, safety and welfare of their citizens are not prohibited from taking into account non-thermal biological effects of RF radiation to the extent that they are not presently covered by the FCC's safety regulations, and

(a) require the placement of transmission antennas a reasonable distance from residences;

(b) require the placement of transmission antennas a reasonable distance away from schools and playgrounds;

(c) apply the Precautionary Approach (as defined in the Benevento Resolution of 2006) (IJ 43) (see par. 35 *supra*) ;

(d) consider and take into account scientific research concerning non-thermal biological effects from RF radiation in making tower and antenna placement decisions pending the FCC's adoption of updated research-based safety regulations concerning such effects; and

---

[1] (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(e) consider and take into account scientific research concerning long-term cumulative effects of RF radiation on human-health pending the FCC's adoption of up-dated research-based safety regulations concerning such effects.

FOURTH CLAIM FOR RELIEF

(Declaratory Judgment Defining Plaintiff's Constitutional Right to Protect Herself and her Children from Government Approval of Potentially Harmful Wireless RF Radiation from Cell Towers)

37. Plaintiff repeats and realleges paragraphs 1 through 36 *supra*.

38. The legislative history of in the Telecommunications Act (TCA) shows that the preemption provision has become void and unenforceable because the FCC's safety regulations are no longer in compliance with the legislative purpose.

39. At the time of the enactment of the TCA, the House Committee on Commerce expressly stated that it was, and is, the Commission's responsibility to adopt "uniform, consistent requirements, *with adequate safeguards of the public health and safety*," and that these were, and are, to be "*established as soon as possible*." (H.R. Report No. 104-204, p. 94) (Emphasis added.)

40. While the original FCC guidelines may have been "adequate safeguards of the public health and safety" under the existing state of scientific knowledge in 1996 (based on thermal effects), that is no longer the case. The post-hearing statement

filed in this proceeding by EMRPI outlines a series of unmet research needs that have been identified by Federal agencies and their expert consultants, including the National Academy of Sciences, which show that the 1996 FCC regulations *no longer* provide "adequate safeguards of the public health and safety" from RF emissions today. The FCC's persistent failure and refusal to initiate independent adequately-funded and well-conducted up-to-date research into RFR effects invalidates and nullifies the preemption clause by removing its underlying premise—that the FCC guidelines must provide "adequate safeguards" established "as soon as possible." They no longer do.

41. The Congressional mandate to the FCC to maintain safeguard standards "adequate" to safeguard public health and safety was reiterated for emphasis on page 95 of House Report 104-204:

> "The Committee believes the Commission rulemaking on this issue (ET Docket 93-62) *should contain adequate, appropriate and necessary levels of protection* of the public, and needs to be completed expeditiously."
>
> (Emphasis added.)

42. The FCC acknowledges on its website that more RF radiation research is being done in Europe than in the U.S. Paragraph 35 above identifies key European studies that Intervenor JAEGER placed before Defendant CONNECTICUT SITING COUNCIL during the pendency of CSC Docket 360.

43. The scientific studies submitted by Intervenor JAEGER support the serious concerns of individual residents, reflected in the signatures collected on the petitions submitted by Intervenor JAEGER at IJ 48, signed by residents of Falls Village. Additional concern was expressed in person by public witnesses at the Public Participation section of the Hearing held on July 1, 2008 in the Town of Canaan. Such publicly expressed concern constitutes sufficient "substantial evidence" to support the denial of the Application.

44. Plaintiff has constitutional rights under the Fourth, Fifth, Ninth and Fourteenth Amendments to be safe and secure in her home, which requires government to protect her from invasions of her and her family's home and seizure of her person by forces that may do her harm. This is equally true for the minor children for whom she is responsible.

45. Plaintiff therefore asks the Court to enter judgment finding and declaring that under subsection (A) of subparagraph (7)[2] of the Telecommunications Act Defendant CONNECTICUT SITING COUNCIL must protect Plaintiff's and other individuals' constitutional rights under the Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to be safe and secure in their homes, and must not permit or authorize the placement of wireless facilities that result in invasion of their homes or

[2] Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

seizure of their persons by wireless RF radiation emissions that scientific studies show may do them harm.

FIFTH CLAIM FOR RELIEF

(Failure to Establish Public Need Under the TCA Renders the Siting Council's Decision Void)

46. Plaintiff repeats and realleges paragraphs 1 through 45 *supra*.

47. The finding of "public need" by the CONNECTICUT SITING COUNCIL in its decision dated March 12, 2009 (Conclusion No. 1), violates the criteria set forth by the Second Circuit in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999). The area is already sufficiently served by wireless providers and the proposed facility is substantially more intrusive than the existing cell sites by reason of its structure, placement and cumulative effects. No substantial evidence is set forth in the COUNCIL's decision in a written record to warrant disregarding the Second Circuit rule.

SIXTH CLAIM FOR RELIEF

(Declaratory Judgment holding C.G.S. § 16-50v providing for Industry Funding of the CONNECTICUT SITING COUNCIL Unconstitutional)

48. Plaintiff repeats and realleges paragraphs 1 through 47 *supra*.

49. Connecticut General Statutes Section 16-50v provides as follows:

> **Sec. 16-50v. Administration expenses. Assessments. Fees. Staff. Consultants. Late fees.** (a) All expenses of administering this chapter, including the functions of the council and its staff, shall be financed as provided in this section.
>
> (b) (1) Before December thirty-first of each year, the council shall review the anticipated amount of expenses attributable to energy facilities for the next fiscal year, excluding expenses under subsection (c), (d), (e), (g) or (h) of this section at a public meeting, notice of which shall be given to each person subject to assessment under this subsection, and at which interested persons shall be heard. After the meeting, the council shall determine the anticipated amount of such expenses and submit its determination to the joint standing committee of the General Assembly having cognizance of appropriations and the budgets of state agencies. After the committee completes its review, the council shall apportion and assess the anticipated amount of expenses among those persons having gross revenue from the sale of electric power at retail in the state in excess of one hundred thousand dollars during the preceding calendar year, in the proportion which the gross revenue of each such person bears to the aggregate gross revenues of all such persons. Each such person shall pay the assessment in three equal installments on or before July thirty-first,

October thirty-first, and January thirty-first of the fiscal year. During the fiscal year the council may further apportion and assess the additional amount of such expenses as could not reasonably have been anticipated prior to the fiscal year, apportioned in the same manner after notice and hearing in the same manner. The total of such assessments for any fiscal year shall not exceed one million five hundred thousand dollars. No proceeds from any assessment under this subsection may be used by the council after June 30, 1984, for any proceedings concerning hazardous waste facilities.

(2) As used in this subdivision, "communications services" means services involving transmitting or receiving signals in the electromagnetic spectrum for a public or commercial purpose pursuant to a Federal Communications Commission license. Before December thirty-first of each year, the council shall review the anticipated amount of administrative expenses attributable to facilities used for providing communications services for the next fiscal year, excluding expenses under subsection (c), (d), (e), (g) or (h) of this section, at a public meeting, notice of which shall be given to each person subject to assessment under this subsection, and at which interested persons shall be heard. After the meeting, the council shall determine the anticipated amount of such expenses and submit its determination to the joint standing committee of the General Assembly having cognizance of matters relating to appropria-

tions and the budgets of state agencies. The council shall apportion and assess the anticipated amount of expenses equitably in proportion to the percentage of the council's direct costs, among those persons who (1) provide communications services or have provided communications services facilities, and (2) have come before the council in the preceding calendar year. Each such person shall pay the assessment and submit a return, on a form prescribed by the council, to the council in four equal installments, on or before July 1, 1994, and July thirty-first of each year thereafter, October 31, 1994, and October thirty-first of each year thereafter, January 31, 1995, and January thirty-first of each year thereafter, and April 30, 1995, and April thirtieth of each year thereafter. The council shall transfer all payments received pursuant to this section to the Treasurer who shall credit such payments to the Siting Council Fund. Such payments shall be considered administrative expenses recovered from communications services providers.

(c) The fee for each application for a certificate for a facility described in subdivisions (1) to (4), inclusive, of subsection (a) of section 16-50i, shall be used to meet the expenses of the council in connection with the review of, hearing on and decision on the application, including the expenses of any consultant employed by the council under subsection (d) of section 16-50n. The council shall, by regulation, adjust the fees to meet the expenses. In addition, the council may assess the applicant

during the proceeding on the application and thereafter, as may be necessary to meet the expenses. The amount of any fees and assessments paid under this subsection which are in excess of the expenses of the council in reviewing and acting upon the application for which the fees and assessments were paid shall be refunded within sixty days after completion of the matter.

(d) The fee for each application for a certificate for a facility described in subdivisions (5) and (6) of subsection (a) of section 16-50i or for a determination regarding shared use of a facility used for providing communications services, as defined in subdivision (2) of subsection (b) of this section, shall be established by regulation and used for the administrative expenses of the council and its staff incurred in processing the application or determination. In the event a hearing is held on any such application or determination, the council may assess an applicant during the proceeding and thereafter for all expenses of the council in connection with the review of, hearing on and decision on such application or determination, including the expenses of any consultant employed by the council pursuant to subsection (d) of section 16-50n.

(e) With regard to any facility described in subsection (a) of section 16-50i, the council shall, by regulation, establish such filing fees and provide for such assessments as may be necessary to meet the expenses of the council and its staff in reviewing and acting upon

each application for an amendment of a certificate, each statement of intent to acquire property prior to the issuance of a certificate, each petition for an advisory ruling, each notice of modification and each appeal pursuant to subsection (d) of section 16-50x. The amount of any fees and assessments paid under this subsection which are in excess of the expenses of the council in reviewing and acting upon the application, statement of intent, petition for an advisory ruling, notice of modification or appeal for which the fees and assessments were paid shall be refunded within sixty days after completion of the matter.

(f) The council shall obtain such full-time and part-time staff and consultants as may be appropriate to carry out its duties and the provisions of this chapter.

(g) The council may undertake such studies as it deems necessary to carry out its duties under subdivision (2) of subsection (a) of section 16-50t. The council shall apportion and assess its expenses for consultants, hearing facilities and stenographic reports and other reasonable and necessary expenses to carry out its duties under subsection (a) of section 16-50t among those persons having gross revenue from the sale of electric power at retail in excess of one hundred thousand dollars during the preceding calendar year, in the proportion which the gross revenue of each such person bears to the aggregate gross revenues of all such persons. Each such person

shall pay the assessment within thirty days. Before incurring expenses for which assessments will be made under this subsection, the council shall review the anticipated expenses at a public meeting, notice of which shall be given to each person subject to the assessment, and at which interested persons shall be heard.

(h) With regard to any facility described in subsection (a) of section 16-50i, the council shall, by regulation, establish such fees and assessments as are necessary to meet the expenses of the council and its staff in conducting field inspections of (1) a certified project constructed pursuant to a development and management plan, or (2) a completed project for which a declaratory or advisory ruling has been issued.

(i) On and after January 1, 2008, with regard to any assessment or other charge billed by the council pursuant to this chapter, the council shall charge late fees or penalties at the rate of one and one-half per cent per month against invoiced amounts not received by the council within thirty days after the due date shown on the council's invoice.

50. The expenses of Defendant CONNECTICUT SITING COUNCIL paid for by telecommunications and energy company assessments include fees, expenses and benefits paid to the individual COUNCIL members for hearing and deciding matters that directly involve regulating the companies' business and financial interests. Such industry-paid expenses also include the salaries of

the Executive Director as well as all other staff members of the COUNCIL.

51. On November 13, 2008, during the pendency of Docket 360, Daniel F. Caruso, Chairman of the CONNECTICUT SITING COUNCIL described the COUNCIL's financing in testimony to the Connecticut Energy Advisory Board Sub-Committee on the Study of Various Energy Issues as follows:

> We operate with ten employees and an annual operating budget of slightly more than $2 million. Our agency is entirely self-funded, in that *we derive all of our revenues from the various companies that we regulate.* * * * The charge of the CONNECTICUT SITING COUNCIL is actually quite unique and different from the other agencies that operate within the regulatory sphere. *Unlike any other agency, the Siting Council serves as an independent judicial arbiter that objectively balances* the statewide need for reliable services, at the lowest reasonable cost to consumers, with *the need to protect the environment and ecology of the state.* * * *
>
> (Emphasis added.)

52. On information and belief, current payment levels for individual COUNCIL members include a per diem fee of $150 for attending hearings (not to exceed $12,000 per year), plus reimbursement for mileage, together with other benefits. None of the compensation paid to COUNCIL members comes out of the general taxes collected from the State's ordinary citizens who are directly affected by its decisions. All funding comes solely from industry members.

53. On information and belief, CELLCO PARTNERSHIP LLC d/b/a VERIZON WIRELESS, the applicant in this proceeding, is one of the companies providing funding of COUNCIL expenses, including the compensation paid to COUNCIL members who participated in the hearing and decision in this very proceeding simultaneously deciding matters directly affecting the health, safety and welfare of ordinary citizen taxpayers, including Intervenor Appellant JAEGER and other citizens of the Town of Falls Village (Canaan) who oppose the placement of the tower at this location.

54. The CONNECTICUT SITING COUNCIL gives the appearance and impression of pro-industry bias by the dismissive manner it shows toward members of the public during COUNCIL proceedings and by the COUNCIL's practice of inviting industry representatives (but not representatives of the public) to the COUNCIL's annual holiday parties. Attached as Exhibit B is the COUNCIL's invitation to its December, 2008 holiday party held at its offices while this proceeding was *sub judice* by the COUNCIL. It will be noted that the attorney representing CELLCO under Docket 360 (Kenneth Baldwin), as well as the Applicant's corporate representative (Sandy Carter), were among the COUNCIL's invited guests. The combination of industry payment of compensation to COUNCIL members and staff, the COUNCIL's treatment of members of the public during its proceedings; personal invitations to industry counsel to attend COUNCIL social events even while their matters are *sub judice*, and the almost universal pro-industry decisions in contested matters all render C.G.S. § 16-50v unconstitutional, impairing guar-

antees of due process and the right to petition for redress of grievances.

PRAYER FOR RELIEF

Plaintiff prays and requests the Court to:

A. Void, vacate and enjoin the Certificate of Environmental Compatibility and Public Need granted to Defendant CELLCO by CONNECTICUT SITING COUNCIL on March 12, 2009, and enjoin the operation of any wireless transmission facility at or near 188 Route 7 South in Falls Village (Canaan) Connecticut, pursuant to the First, Second and Fifth Claims for Relief;

B. Grant declaratory judgment as requested in the Third Claim for Relief, and direct and enjoin the CONNECTICUT SITING COUNCIL from placing any wireless transmission facility within 1500 feet (or other research-based safe distance) from schools or private residences in the Town of Canaan or elsewhere in the State of Connecticut;

C. Grant declaratory judgment as requested in the Fourth Claim for Relief, recognizing and defining Plaintiff's constitutional right to be kept safe from government authorization and approval of potentially harmful and RF radiation emissions;

D. Hold C.G.S. § 16-50v providing for industry funding of the CONNECTICUT SITING COUNCIL unconstitutional;

F. Direct and order Defendant CELLCO to remove any wireless transmission facility erected at 188 Route 7 South in Falls Village (Canaan) during the pendency of this action;

G. Award Plaintiff her attorneys fees, costs and expenses in initiating and prosecuting this proceeding in the public interest, pursuant to the Equal Access to Justice Act or other appropriate authority designed to encourage citizens to bring actions in the Courts to protect and vindicate citizen rights before administrative agencies; and

H. Award Plaintiff such other, further and different relief as the Court may deem appropriate.

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Attorney for Plaintiff

April 8, 2009

Department of the Interior Comments on the Migratory Bird Treaty Act filed with FCC in January, 2011

Division of Migratory Bird Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive—MBSP-4107
Arlington, VA 22203

January 14, 2011

Mr. Aaron Goldschmidt, Esq.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Comments of the U.S. Fish and Wildlife Service's Division of Migratory Bird Management filed electronically, on WT Docket No. 08-61 and WT Docket No. 03-187, Regarding the Environmental Effects of the Federal Communication Commission's Antenna Structure Registration Program

Dear Mr. Goldschmidt:

The Division of Migratory Bird Management (DMBM), U.S. Fish and Wildlife Service (FWS or Service) is pleased to provide the following comments on the Federal Communication Commission's (FCC or Commission) Antenna Structure Registration Program (ASRP). We had planned to present oral comments before the Commission on December 6, 2010, but at the last minute were unable to attend.

Introductory Comments

The Service appreciates the opportunity to continue working with the FCC, a relationship that was spurred by a large single-night kill of up to 10,000 Lapland Longspurs and other birds at 4 adjacent communication towers and a nearby, lighted outbuilding near Syracuse, Kansas, in February 1998. The relationship with FCC more formally began in 1999 at an avian-communication tower workshop at Cornell University at which the FCC was a presenter, and with the 1999 formation of the Communication Tower Working Group that we currently chair and which the FCC has been an active participant. We look forward to maintaining this collaborative relationship into the future while significantly reducing the "take" (defined as, "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect" without a permit; 50 CFR 10.12) of migratory birds at communication towers.

Statutory and Regulatory Issues Affecting Migratory Birds

The Service now protects and manages 1,007 migratory birds (50 CFR 10.13, March 1, 2010). Each time a protected bird strikes a communication tower and is killed or injured, the collision represents an unpermitted "take" under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703-712), a strict liability statute. While yet to be validated in wild breeding birds in North America, radiation from cellular communication towers in Europe is being documented as a problem for nest-

ing birds, resulting in reduced recruitment, poor chick survivorship and mortality around cellular communication towers where nesting is occurring (Balmori 2005, Balmori and Hallberg 2007, and Everaert and Bauwens 2007). Radiation at the same frequency and intensity as that used in cellular telephones in the U.S. has been validated in the laboratory as a problem for domestic chicken embryos, resulting in deaths (DeCarlo et al. 2002, Manville 2009). If radiation is injuring or killing wild migratory birds, this represents yet another unpermitted "take" of protected species in the U.S.

Bald and Golden Eagles are additionally protected under the Bald and Golden Eagle Protection Act (BGEPA; 16 U.S.C. 668-668d), also a strict liability statute. The Service updated the definition of "disturb" under BGEPA (50 CFR 22.3) to include:

> "to agitate or bother a Bald or Golden Eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior."

To implement this definition, in late 2009 the Service promulgated 2 new regulations that would allow "take" including "disturbance" and limited "take resulting in mortality" (50 CFR 22.26) and "take" of eagle nests for health and safety reasons (50 CFR 22.27). Where communication towers "take" Bald Eagles—either through "disturbance"

or by lethal means—an individual "take" permit would be required to be in compliance with the law. The exception is for the Sonoran Desert population of Bald Eagles still listed under ESA.

For Golden Eagles, we will likely only consider programmatic "take" permits (defined under 50 CFR 22.3 as "take that is recurring, is not caused solely by indirect effects, and that occurs over the long term or in a location or locations that cannot be specifically identified"). For both species, permits will only be issued where the breeding population of the raptor is stable or increasing. Thus provisions regarding "disturbance" and "take" under BGEPA now need to be evaluated both by the FCC and by tower developers, owners and lessees. We suggest tower owners and/or operators contact the nearest FWS Ecological Services Field Office for guidance on eagle issues and permitting. Guidance for implementing individual and programmatic take permits is presently being developed. Additional details can be found on the Service's Migratory Bird website (www.fws.gov/migratorybirds/) as this information becomes available to the public.

Executive Order 13186 (Responsibilities of Federal Agencies to Protect Migratory Birds; January 10, 2001) states that ". . . each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement . . . a Memorandum of Understanding with the Fish and Wildlife Service that shall promote the conservation of migratory bird populations" (*Federal Register* 66(11):3854). The Service strongly

encourages the FCC to develop, sign and implement an MOU with us under the auspices of E.O. 13186. While FCC is an independent Commission, the Service is about to sign an MOU under the EO with the Federal Energy Regulatory Commission, yet another independent Commission. We encourage development of a similar MOU with the FCC which could include the ASRP as well as other communication tower-migratory bird issues raised by the Service during proposed rulemaking in 2007 (Manville 2007).

FCC National Environmental Policy Act (NEPA) Regulations

Section 1.1306 of the FCC's NEPA regulations (47 CFR 1.1301-1.1319) categorically excludes from environmental processing all Commission actions except where communication towers are to be built in wilderness, designated wildlife refuges, on flood plains, where significant surface features are affected, or where Federally listed species are affected, and for other reasons not related to migratory birds. Unless listed, migratory birds have been excluded from this review. However, the Court of Appeals in *ABC v. FCC* held that registered communication towers (i.e., those > 200 ft above ground level [AGL] in height or within 3.8 statute miles of airport approach and departure runways) may have significant adverse environmental effects on migratory birds, thus necessitating this programmatic environmental assessment (PEA). As the Service previously stated in our 2007 comments to the FCC regarding proposed rulemaking (Manville 2007), migratory

birds need to be included in the FCC's NEPA review for *all* communication towers.

Based on the court's determination, this PEA is intended to determine if the ASRP has significant environmental impacts, focusing on migratory birds and listed species. The PEA will consider direct, indirect, and cumulative effects, focusing on impacts from tower location, height, guy wire support, and lighting.

Validated and Estimated Impacts from Communication Towers

Early U.S. Estimates

The impacts of communication towers on migratory birds have been reported in the U.S. scientific literature for more than half a century. Aronoff (1949) first reported several hundred migratory birds that were retrieved from a Baltimore, Maryland, radio tower in 1948. Later, Mayfield (1967) attempted to estimate nationwide bird-tower-collision mortality. During the 1970s, the Service's Bureau of Sports Fisheries and Wildlife raised upward the previous mortality estimates of Mayfield (1967) where Banks (1979) then estimated average annual mortality at 1.25 million birds/yr. This represented the best and most scientifically valid estimate of tower mortality at the time. To update Banks' FWS mortality figure, Evans (1998) and the Service (Manville 2001a, 2001b, 2005) adjusted the Banks estimate to account for increasing numbers of towers since 1979, resulting in the Service's current estimate of 4- 5 million birds killed/yr. at all U.S. towers. A nationwide

cumulative impacts analysis will help to determine the most reliable estimate of bird mortality.

A Meta-analysis

An effort by some of the most respected avian-communication tower experts in Canada and the U.S. has produced 2 nearly final manuscripts for submission to a leading scientific journal. The publications will address impacts of tall communication towers to various species of migratory birds (Longcore et al. 2011a , 2011b). The scientists have performed a meta-analysis of bird-tower collisions from published and unpublished records in Canada and the U.S. These include information from 292,925 bird specimens, of 238 different species, collected at 72 North American locations, and they calculated the mean proportion of each species killed at towers within each Bird Conservation Region (BCR) in North America. The mean proportion depends on the correlation between tower height and estimated annual avian mortality. It is already known that taller towers kill more birds than do shorter towers (Gehring and Kerlinger 2007a, 2007b, Gehring et al. in press, Manville 2007, Karlsson 1977). In the Longcore et al. (2011a) study, the authors found that more than 50% of the avian mortality was caused by towers > 984 ft AGL tall, of which only 1,021 were in their study database comprising only 1.6% of all towers examined. Based on data analysis, shorter towers, even those < 490 ft AGL contributed to approximately 25% of all mortality simply because of their sheer numbers. Towers < 600 ft AGL have for the most part been previously left out of esti-

mates of avian mortality. The authors are now able to construct an estimate of total bird mortality that considers towers < 600 ft AGL, with help from Gehring et al. (2009) and other sources.

By geographically stratifying the estimates of avian mortality with estimates of the proportion of each bird species killed within different BCRs, Longcore et al. (2011a, 2011b) have developed geographically explicit estimates of avian mortality at communication towers by species. They compare per-species mortality estimates with population estimates of those species to evaluate the biological significance of this form of collision mortality. In the Longcore et al. (2011a, 2011b) meta-analysis, it is clear that some species are killed disproportionately to other species, contrary to Mayfield's (1967) assertion that tower kill mortality does not affect bird populations because birds are killed at towers in proportion to their abundance. Quite to the contrary, the results show that some species experience tower collision mortality far out of proportion to their population size, as illustrated by Graber (1968). While some of these new estimates should be viewed with caution, especially those with fewer specimens contributing to the mortality profile, the new estimates are especially troubling.

Longcore et al. (2011b) found that many *Birds of Conservation Concern* (BCC; USFWS 2008) suffer mortality equivalent to several percent of their total population size. These conditions may be causing a population effect to some species. Specifically, 42 BCCs, 2 Federally endangered, and 1 State rare and endangered bird were found to be

killed at communication towers in Canada and the U.S. based on this meta-analysis. Of these, 15 BCCs have annual mortality estimated to exceed 0.5% of their estimated population size, and 8 BCCs have mortality estimated to exceed 1.0% of their estimated population size. Mortality is estimated to approach 5% in some species, and nearly 13% for the Yellow Rail. Ten of the 20 bird species killed most frequently by percentage of their population are either BCCs or Federally or State endangered birds (i.e., the Federally endangered Bermuda Petrel [6.1%] and the State rare and endangered Pied-billed Grebe [6.2%]). The Federally threatened Red-cockaded Woodpecker was reported infrequently killed at towers (0.1%). The list of birds of concern that may be suffering impacts to their populations includes the Bay-breasted Warbler, Swainson's Warbler, Harris' Sparrow, Black-throated Blue Warbler, Golden-winged Warbler, Yellow-throated Warbler, and the Kentucky Warbler.

Overall, Longcore et al. (2011a) estimated total annual avian mortality at 3.9- 5.9 million birds in the U.S. and Canada. The 3.9-million estimate was calculated from the un-weighted regression with the new shorter towers included, while the 5.9-million estimate was calculated using the regression weighted by study length. Approximately 94% of the annual mortality was estimated east of the Rocky Mountain Front. This meta-analysis clearly raises concerns for some species at their population levels and it helps validate the Service's current tower mortality estimate.

Lighting Studies and Conservation Measures

The Michigan State Police tower lighting study of 21 towers by Gehring et al. (2009) has now clearly demonstrated—in a scientifically valid way—the existence of a proven "conservation measure" that should reduce tower mortality by a highly significant degree where L-810 steady-burning red lights can be extinguished on existing towers or not installed on new towers. The Federal Aviation Administration (FAA) has already successfully conducted several pilot conspicuity studies where L-810 lights were extinguished, FAA appears to be satisfied with the results of these studies regarding continued pilot safety, and will publish an amended lighting circular in the near future that will *not* contain L-810 lighting where it currently is required. We also understand that the FAA is considering increasing the minimum height of towers requiring lighting to 305 ft AGL to better align with tower-height lighting minimums in Canada and Europe.

Ongoing research from a 3-year, U.S. Coast Guard-funded study being conducted by J. Gehring at 6 tall towers in Michigan and 1 in New Jersey continues to validate results from the Gehring et al. (2009) research. The preliminary findings show that avian fatalities can be significantly reduced at taller communication towers by using only flashing (i.e., strobed or blinking) lighting systems without L-810 lights. Preliminary data from the New Jersey component of this study suggest that the 350 ft AGL unguyed tower in Cape May is not involved in large numbers of avian fatalities. Elimination of L-810 lighting,

replaced with blinking or strobed red lighting (white strobe-lit-towers do not require L-810 lights), was shown at some towers in Michigan to reduce avian mortality by up to 72% (Gehring et al. 2009, Manville 2007). Based in major part on the study results from Gehring et al. (2009), the Service is now recommending as one of its primary conservation measures extinguishing all L-810 lighting to significantly reduce collisions of migratory birds at communication towers where this lighting regime is presently required. We strongly recommend that the FCC include a review of all towers lit with L-810 lights as a major part of their proposed PEA and work with the Service to see that L-810 lights are extinguished on all applicable towers.

While tall towers have been documented to kill birds even under perfectly clear night skies, as Crawford and Engstrom (2001) reported moderate numbers were killed, inclement night weather events that coincide with songbird migration have been documented to be especially deadly (e.g., Manville 2007). This was well documented during fall 2005 at both tall and very short towers when heavy fog in the East and Midwest coincided with nighttime migration reported by the Service to the FCC in our comments regarding proposed rulemaking (Manville 2007:6-7). This included single-night, mass mortality events in Wisconsin, at several documented locations in New York, and at several ~ 150-ft AGL, unlit cellular telephone towers in North-central Pennsylvania. W. Evans (Executive Director, Old Bird, Inc., pers. com.) reported at least 147 salvaged birds at one of these cellular towers, mostly Blackpoll Warblers.

Biologists from the Pennsylvania Game Commission verified these findings when they reported the retrieval and necropsy of at least 140 birds from one of the locations (October 19, 2005 PA Game Comm. Release # 119-05, "Bird deaths in Quehanna due to collisions"). Both Evans and the Game Commission reported that nearby, steady-burning bright light sources appeared to result in the bird congregations at the cell towers that led to the kills. This is a situation that can easily be remedied. Steady-burning lighting at out-buildings, related communication tower infrastructure (e.g., radio/television buildings or power substations), and nearby, lighted power poles, for example, should be extinguished as recommended in the Service's 2000 voluntary communication tower guidelines, 2006 recommendations to the electric utility industry (APLIC 2006), 2007 comments to the FCC, and recommendations to the Service from the 2010 Wind Energy Federal Advisory Committee. Steady-burning lights should be replaced with down-shielded, heat- or motion-sensitive security lighting that only comes "on" when it is needed. Steady-burning lights have been well documented especially in inclement weather to be major attractants for birds, resulting in numerous, well-documented mass mortality events (Manville 2007, 2009).

Concerns with Radiation Issues

Radiation impacts have only recently become a conservation issue with field studies on nesting birds initiated around 2000 in Europe (Balmori 2005, Balmori and Hallberg 2007, Everaert and

Bauwens 2007) and laboratory studies conducted in the U.S. during the late 1990s on chicken embryos (T. Litovitz pers. comm., DiCarlo et al. 2002). Virtually unknown, however, are the potential effects of non-ionizing, non-thermal tower radiation on wild nesting avifauna in North America, including at extremely low radiation levels, far below the safe exposure level previously determined for humans. Unfortunately, these "safe" levels continue to be based on thermal heating standards, now inapplicable. Based on studies in Europe, communication towers appear to be the cause of radiation impacts to breeding migratory birds. We, therefore, suggest FCC include a provision in their NEPA review to assess this aspect of the cumulative impacts of these structures in the United States. The Service is very interested in conducting radiation research on breeding birds in the United States, and would be glad to work with the FCC to make that happen as part of this NEPA review.

Service Recommendations for FCC NEPA Review

We provide the following recommendations to be incorporated into the FCC's NEPA review of the ASRP, including those suggestions below previously provided to FCC in 2007 regarding proposed rulemaking. We suggest that FCC's NEPA review of the ASRP be as inclusive as possible.

- As early as 1999, the Service's then Director Jamie Clark urged the FCC to coordinate with the Service in the development of a Programmatic Environmental Impact

Statement (PEIS) regarding communication towers. Given the documented, estimated, and predicted levels of "take" at communication towers nationwide (e.g., Longcore et al. 2011a, 2011b)—including the potential but yet un-validated impacts from radiation on breeding birds in North-American—and the "take" of migratory birds at short towers, including those unlit but guyed and < 200 ft AGL (Manville 2007), we recommend that FCC develop a PEIS rather than a PEA. The Service can work cooperatively with staff from the FCC to flesh out the components—recommended below—of a PEIS. 40 CFR 1501.6 of NEPA gives the Service authority to function as a cooperating agency and Section 1503.2 provides us the authority to comment on federally-licensed activities for agencies with jurisdiction by law, including under MBTA. Additionally, the Service is required by the ESA to assist other Federal agencies—including the Commission—to ensure that any action authorized, implemented or funded by that agency will not jeopardize the continued existence of any Federally listed species. We specifically recommend the following:

- Avoid use of any L-810 steady-burning red lights on new towers being constructed, towers whose broadcast licenses expire and must be re-issued, towers being replaced, and where L-810 side lights burn out (replace with strobe or blinking lights).

Pending FAA's update to their current (2007) lighting circular—which we are advised will occur in the near future—all L-810 lights should be extinguished and all L-810 lights should be removed as part of any retrofit (Gehring et al. 2009, Manville 2009).

- Use minimum intensity, maximum "off"-phased red strobe (or strobe-like), white strobe or red blinking incandescent lights with no L-810 sidelights. Use of red or white color and use of strobe versus blinking lights were not statistically different in several previously conducted studies (Gauthreaux and Belser 2006, Gehring et al. 2009).
- Where new towers are to be constructed, or where repair or upgrade of towers will result in increased tower height, where practical attempt to keep towers under 200 ft. AGL in height, be of monopole or lattice design, and contain no guy wires and lights. This represents the Service's recommended "gold standard" and the environmentally preferred alternative for tower placement.
- On May 4, 2010, the "Infrastructure Coalition" (CTIA, NAB, PCIA, and NATE) and the "Groups" (American Bird Conservancy, National Audubon Society, and Defender of Wildlife) submitted an MOU to FCC with interim recommendations for tower height and lighting categories under the ASRP. While we generally agree with the height risk categories (i.e., new towers > 450 ft

AGL be placed in Category #1 [always requiring an Environmental Assessment and always placed on public notice], those 351- 450 ft AGL in Category #2 [may not initially require an EA but will always be placed on public notice], and those ≤ 350 ft AGL in Category #3 [does not require an EA and is not placed on public notice]), we disagree with the industry's recommendation that Category #3 towers not require an EA based on avian concerns and that no public notice be required. The latter concern was a dissenting issue for the "Groups." Given the Service's desire to include all towers in a cumulative impacts analysis, ongoing evidence of tower kills at "short" towers (including some that are unlit), new concerns about radiation impacts to breeding birds—especially from cell towers—and the need to better track where towers are being situated, we recommend public notice for this category of towers. This will allow stakeholders an opportunity to raise avian concerns to which the FCC and the Service may be unaware. If the evidence in the public record becomes compelling, an EA would be required upon filing with the FCC once the Commission makes that determination. Additional recommendations include:

- Remove a tower within 12 months after it becomes inoperative.
- Where tower height and guy wires become an issue, more, shorter, unguyed and unlit

towers are recommended over fewer but taller, guyed and lit towers.

- Avoid constructing towers in or adjacent to wetlands and other areas where birds concentrate in large numbers or where listed, imperiled, or disturbance- sensitive birds are present.
- Avoid use of any lighting on tower infrastructure (e.g., outbuildings and power stations) that remains lit during the night. Instead, use motion or heat-sensitive lights that operate only for short periods, and down-shield all such lighting.
- FCC should require development and use of a Tower Site Evaluation Form, similar to the one created by the Service that accompanied the 2000 voluntary tower guidance. The FCC should require that the industry complete and submit this form to the appropriate Ecological Services Field Office for review, allowing the Service to make a "study or no-study" determination for tower placement at a proposed site. We provided suggested language to the FCC in our 2007 comments (Manville 2007:25).
- Under FCC's NEPA review, we recommend the Commission consider including voluntary bird mortality reporting to the Service by tower owners, operators, or their lessees once a tower is sited and constructed. The Service already maintains a password-protected, voluntary reporting system administered by the Office of Law Enforcement

which dozens of electric utilities are presently using, a wind generation company is field-testing, and which could be modified for use by communication tower owners and operators (https://birdreport.fws.gov/). Such reporting could help better understand when and where mass mortality events occur, and begin to better determine cumulative effects. However, if a tower operator or consultant wishes to "possess" a bird carcass, a Scientific Collecting (50 CFR 21.23) or Special Purpose permit (50 CFR 21.27) is required, which includes mandatory reporting as a condition of both permits.

- FCC should require a post-construction monitoring process that assesses and evaluates mortality and/or habitat fragmentation and disturbance at a statistically significant sample of communication towers of different height classes (i.e., unlit, lit, unguyed, guyed, cellular, radio, television, DTV, emergency broadcast, and others). This will help to begin addressing the cumulative impacts assessment.
- FCC and the tower owners and operators it regulates need to coordinate with DMBM, the appropriate Ecological Services Field Office, and the pertinent Regional eagle biologist regarding the possibility of eagle "take" at a communication tower or its infrastructure resulting in "disturbance" or "take resulting in mortality" for both Bald and Golden Eagles under 50 CFR 22.26,

and for "take" of eagle nests for health and safety reasons for eagles and humans under 50 CFR 22.27. Where "take" occurs, a permit under these regulations is required under BGEPA. The Service's eagle and migratory bird experts would be glad to coordinate with the tower owners and operators in avoiding unpermitted eagle "take."

- The FCC must consult with the Service, as required by Section 7 of the ESA, where any listed species and/or their critical habitats are impacted by the ASRP.
- Under auspices of FCC's NEPA review, the FCC should develop and implement an MOU with the Service under E.O. 13186--incorporating the ASRP as part of this suggested MOU.

This concludes our recommendations to the FCC on the Antenna Structure Registration Program. We appreciate the opportunity to comment on this important program and look forward to making communication towers much more bird-friendly. Should you have any specific questions about these comments, please contact Dr. Albert Manville of our Division (703/358-1963; albert_manville@fws.gov). Respectfully submitted,

Marcia Pradines
/s/

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